IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1041

ARNOLD J. HOPKINS, DIRECTOR, DIVISION OF PAROLE AND PROBATION, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Petitioner,

v.

VIRGINIA LYNNETTE FABRITZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Arnold J. Hopkins, Director of the Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, the petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 28, 1978.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit was filed on September 28, 1978, and is reported as *Fabritz v. Traurig*, 583 F.2d 697 (4th Cir. 1978); the majority and dissenting opinions also appear in the appendix to this petition (A. 53a). The memorandum and order of the United States District Court for

the District of Maryland, *Fabritz v. Traurig,* Civil No. Y-76-967, dated January 2, 1977, which was vacated by the court of appeals is unreported but appears in the appendix (A. 44a).

Also integral to this case are three opinions of the Maryland appellate courts which set forth the applicable law and the relevant facts. The original opinion of the Court of Special Appeals of Maryland reversing the respondent's conviction, reported as *Fabritz v. State,* 24 Md. App. 708, 332 A.2d 324 (1975), also appears in the appendix (A. 1a). Likewise included in the appendix are the opinion of the Court of Appeals of Maryland, *State v. Fabritz,* 276 Md. 416, 348 A.2d 275 (1975) (A. 8a), reversing the judgment of the Court of Special Appeals and the opinion of that court on remand, affirming the respondent's conviction. *Fabritz v. State,* 30 Md. App. 1, 351 A.2d 477 (1976) (A. 27a). Finally, this Court's denial of a writ of certiorari to review these judgments of the Maryland appellate courts is reported as *Fabritz v. Maryland,* 425 U.S. 942 (1976).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit which is sought to be reviewed was entered on September 28, 1978, and this petition is filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit under the guise of a due process scrutiny of the evidence leading to the respondent's conviction impermissibly reinterpreted Maryland's Child Abuse Law to add the element of scienter in conflict with the decision of the State's highest court?

2. Whether the circuit court misapplied this Court's due process test for gauging the evidence supportive of a conviction and abused the limitations of the habeas corpus remedy to conclude that no evidence warranted the respondent's conviction of child abuse?

3. Whether the circuit court lacked habeas corpus jurisdiction to void the respondent's conviction on a due process ground not raised in the State's courts?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland

Article 27, § 35A

Purpose. — The General Assembly hereby declares as its legislative intent and purpose the protection of children who have been the subject of abuse by mandating the reporting of suspected abuse, by extending immunity to those who report in good faith, by requiring prompt investigations of such reports and by causing immediate, cooperative efforts by the responsible agencies on behalf of such children.

(a) *Penalty.* — Any parent, adoptive parent or other person who has the permanent or temporary care or

custody or responsibility for the supervision of a minor child under the age of eighteen years who causes abuse to such minor child shall be guilty of a felony and upon conviction shall be sentenced to not more than fifteen years in the penitentiary.

(b) *Definitions.* — Wherever used in this section, unless the context clearly indicates otherwise:

1. *"Health practitioner"* includes any physician, surgeon, psychologist, dentist and any other person authorized to engage in the practice of healing, any resident or intern in any of these professions, and any registered or licensed practical nurse attending or treating a child in the absence of a practitioner of any of these professions.

2. *"Child"* means any person under the age of eighteen (18) years.

3. *"Local department of social services"* and *"local State's attorney"* refer to the jurisdiction in which the child lives, or where the abuse is alleged to have taken place, if different.

4. *"Educator or social worker"* shall mean any teacher, counselor or other professional employee of any school, public, parochial or private, or any caseworker or social worker or other professional employee of any public or private social, educational, health or social service agency or any probation or parole officer or any professional employee of a correctional institution.

5. *"Law-enforcement officer"* shall mean any police officer or State trooper in the service of the State of Maryland or any county or municipality thereof.

6. *"Law-enforcement agency"* shall mean any police department, bureau or force of any county or Baltimore City, any police department, bureau or force of any incorporated municipality or the Maryland State Police.

7. *"Abuse"* shall mean any: (A) physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child (B) any sexual abuse of a child, whether physical injuries are sustained or not.

8. *"Sexual abuse"* shall mean any act or acts involving sexual molestation or exploitation, including but not limited to incest, rape, carnal knowledge, sodomy or unnatural or perverted sexual practices on a child by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child.

* * * * * *

STATEMENT OF THE CASE

The only facts pertinent to the respondent's federal habeas corpus case are those found by the Court of Appeals of Maryland, the State's highest court, in *State v. Fabritz,* 276 Md. 416, 418-19, 348 A.2d 275, 276-77 (1975):

> Virginia Lynnette Fabritz (Virginia) was charged with violating . . . [the Maryland Child Abuse Law] by abusing her three-and-one-half year-old daughter Windy. Evidence adduced at the trial before a jury in the Circuit Court for Calvert County showed that Windy was brought to the Calvert County Hospital at 10:35 p.m. on October 3, 1973, in a badly beaten condition with approximately seventy bruises or contusions covering her body, ranging in sizes from one inch to five inches. She was pronounced dead on arrival at the hospital, her death being attributed to peritonitis resulting from a perforated or ruptured duodenum. The evidence showed that Windy's injuries were the result of "blunt trauma" caused by an instrument, or a fist, or some kind of blow inflicted within eighteen to twenty-four hours prior to her death.

Virginia had left Windy in the custody of Thomas Crockett and his wife, Ann, with whom she resided, on October 1. Virginia did not see Windy again until 1 p.m. on October 3, at which time she noticed that Windy was very listless. Crockett told her that Windy had driven with him on his motorcycle and had gotten sick as a result of a bumpy ride. At 2:30 p.m. Windy complained of cramps and was running a slight fever; Virginia attributed this to the flu. She then bathed Windy and, after observing her badly beaten body, put her to bed and spent the remainder of the afternoon watching Crockett work on his motorcycle. At 5 p.m. Virginia observed that Windy appeared to be in a semi-conscious state, but she did not take her to the hospital because she 'was too ashamed of the bruises on her daughter's body.' There was evidence that Windy thereafter sat up and appeared normal for a brief period, but at 6 p.m. she vomited and again complained that she did not feel well. At 7 p.m. Virginia put Windy back to bed and called a friend, Connie Schaeffer, and asked that she look at Windy. Miss Schaeffer arrived at 9 p.m. Windy was laying on the floor of the den, covered by a wet diaper. She was limp and appeared unconscious. When Miss Schaeffer questioned Virginia about the bruises on Windy's body, Virginia responded, 'Tommy (Crockett) hits hard.' Windy's condition worsened and at 9:45 p.m. Ann Crockett contacted the hospital. She was advised to bring Windy to the hospital immediately. After Mrs. Crockett left for the hospital with Windy, Virginia told Miss Schaeffer, 'it is my fault. I killed her.' Shortly thereafter, Virginia went to the hospital and learned that Windy was dead.

Expert medical evidence was adduced to show that a child with peritonitis would vigorously complain once she sustained the injury and would continue to complain until the onset of a coma; that at the time the injuries were sustained, there would have been immediate pain and the child would have begun to feel poorly; that the pain would have gradually increased, followed by fever, vomiting,

and lack of appetite; that within six hours prior to death, the child would have become stuporous and comatose; that Windy would have lived had an operation been performed within at least twelve hours prior to death; and that she would have had a chance to survive if surgery had been performed up to an hour before death. A pathologist testified that it was his medical opinion, based upon the degree of injury, the multiplicity of wounds and his examination of Windy's body, that the injuries did not happen accidentally. There was no evidence indicating that Virginia struck the blows which caused the initial injuries to her child, nor was there any evidence to show that Virginia had knowledge that the person in whose custody she left Windy would abuse her.

Upon this evidence, the respondent was convicted of violating Article 27, Section 35A of the Annotated Code of Maryland, which makes it a crime for a parent to cause injury to his or her child "as a result of cruel or inhuman treatment."

Maryland's intermediate appellate court, the Court of Special Appeals, reversed the respondent's conviction on the basis that "to be guilty under the statute, the accused must be shown to have caused the injury, not simply aggravated it by failure to seek assistance." 24 Md. App. at 714, 332 A.2d at 327.

The Court of Appeals of Maryland rejected this interpretation of the Child Abuse Law holding that "a parent would be criminally responsible as having 'caused' such a physical injury to his child in the sense contemplated by the statute if, as a result of the parent's 'cruel or inhumane treatment,' the child suffered bodily harm additional to that initially sustained as a consequence of the injury originally inflicted upon him." 276 Md. at 424, 348 A.2d at 280. Nowhere in the court's opinion did the judges suggest that actual knowledge by the parent of the risk of harm to the child was a crucial or indispensible factor under

the statute. After interpreting the law, the court proceeded to determine whether there was sufficient evidence for a jury to conclude that the respondent's failure to obtain medical assistance for her child constituted cruel or inhuman treatment resulting in physical injury:

> That Virginia knew of Windy's severly beaten condition is manifest from the evidence; indeed, as the photographic exhibits in the case so painfully demonstrate, Windy bore the multiple bruises of a vicious assault, of which Virginia was aware at least as early as 2:30 p.m. on October 3, 1973. Between that hour, and 10:35 p.m. when Windy died, Virginia failed to seek or obtain any medical assistance although, as the evidence heretofore outlined so plainly indicates, the need therefor was obviously compelling and urgent. There was evidence that Virginia's failure to seek such assistance was based upon her realization that the burises covering Windy's body would become known were the child examined or treated by a physician. Other evidence in the case all too graphically illustrated the suffering to which Wendy was subjected by Virginia's failure to provide the treatment needed to save the child's life. We think the jury properly could have concluded from the evidence that, as a result of Virginia's conduct, Windy's condition was permitted to steadily deteriorate until the child's ordeal was ended by death; that Virginia's failure to act caused Windy to sustain bodily injury additional to and beyond that inflicted upon her by reason of the original assault and constituted as cause of the further progression and worsening of the injuries which led to Windy's death; and that in these circumstances Virginia's treatment of Windy was "cruel or inhumane" within the meaning of the statute and as those terms are commonly understood.

276 Md. at 425-26, 348 A.2d at 280-81.

The court then remanded the case to the Court of Special Appeals which disposed of the remaining issues in the appeal and affirmed the respondent's conviction. 30 Md. App. 1, 351 A.2d 471. On March 2, 1976, the respondent filed a petition for a writ of certiorari with this Court, raising various constitutional issues, but as in the Maryland courts she did not claim that her conviction violated due process because no evidence existed to support it. On April 19, 1976, the petition was denied 425 U.S. 942 (1976).

Subsequently the respondent applied for a writ of habeas corpus in the United States District Court for the District of Maryland. She urged among other grounds that the Maryland Child Abuse Law was unconstitutionally vague. The district court rejected these arguments in its decision of January 2, 1977 (A. 44a).

Upon timely appeal to the United States Court of Appeals for the Fourth Circuit, the parties again briefed the issue of the constitutionality of the statute. At oral argument of the case on October 7, 1977, the panel queried the parties on the sufficiency of the evidence. *Sua sponte* the panel ordered supplemental briefs and the transcript of the trial proceedings to decide the issue of the constitutional sufficiency of the evidence. Without further argument, on September 28, 1978, a majority of the circuit court panel filed an opinion indicating the appropriateness of habeas corpus relief, first concluding that scienter was a "crucial" and "indispensible" element in Maryland's Child Abuse Law, 583 F.2d at 698 & 700, and then finding that the record failed to demonstrate any evidence that "the mother had knowledge of the critical gravity of her daughter's condition when she deferred resort to medical advice." 583 F.2d at 698.

In a vigorous dissent, Chief Judge Haynsworth contended that "the proof at trial did not permit a conclusion on our part that there was no evidence to

support a finding of a violation of the statute by the mother," 583 F.2d at 700, and argued that the respondent "consciously refrained from seeking medical help" for her child.[1] 583 F.2d at 701.

I.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS IMPERMISSIBLY REINTERPRETED MARYLAND'S CHILD ABUSE LAW TO ADD THE ELEMENT OF SCIENTER IN CONFLICT WITH THE DECISION OF THE STATE'S HIGHEST COURT.

Rule 19 of this Court provides that a writ of certiorari may be granted where a United States circuit court of appeals has decided an important state question in a way which conflicts with applicable state law. Thus this Court has recognized that it is not the province of federal courts to decide state law questions in conflict with applicable state statutory or common law and that usurpation of this important state court function may warrant exercise of this Court's power of review. *See Mullaney v. Wilbur,* 421 U.S. 684, 693 (1975) ("This Court . . . repeatedly has held that State Courts are the ultimate expositors of State Law."); *Wainwright v. Stone,* 414 U.S. 21, 22-23 (1973) ("[W]e must take the statute as though it read precisely as the highest court

[1] Before issuance of the circuit court opinions, the respondent was released on parole. Nevertheless, this case is not moot. Even if her release were unconditional, which it is not, the respondent would still be in "custody" for purposes of the federal habeas corpus statute. Carafas v. LaVallee, 391 U.S. 234 (1968). Moreover, problems that may arise in connection with the conditions or revocation of the respondent's parole or the desirability of the expungement of her criminal record hinge on the outcome of this case. Finally, the State is and will continue to be genuinely aggrieved by the circuit court's wrongful interpretation of an important Maryland law.

For these reasons, the State is filing this petition in the name of the public official who has supervisory authority over the respondent, specifically, Arnold J. Hopkins, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services.

of the State has interpreted it."); *Prince v. Massachusetts,* 321 U.S. 158 (1944) (a state court's construction of a state statute is not reviewable by this court); *Howard v. Fleming,* 191 U.S. 126 (1903). (whether an offense exists under state law is not a federal question and the decision of the state's highest court is conclusive upon the matter).

This Court has said that examination of the language of state statutes by federal courts necessitates a "delicate involvement in federal-state relations." *Garner v. Louisiana,* 368 U.S. 157, 169 (1961). In the present case, the circuit court has cast delicacy aside and trampled upon the legitimate function of the Maryland courts.

The Court of Appeals of Maryland has held that the State's Child Abuse Law punishes failure by a parent to seek medical assistance for his child where that failure aggravates the child's injuries. Knowledge by the parent of the risk of harm caused by his inaction plays no role in the equation. If anything, objective rather than subjective factors (such as scienter) mark the Maryland court's description of the statute. The "crucial" and "indispensable" elements are aggravation of injury and parental inaction, not the subjective knowledge of the wrongdoer. The circuit court nowhere criticized the definition of culpable conduct as expounded by Maryland's highest court for violating due process; instead, the divided panel *sua sponte* added a requirement of scienter which it then found wanting on the record of this case. The language of the circuit court clearly and firmly fastens the requirement of scienter (guilty knowledge) upon the Maryland statutory crime of child abuse. This result flies directly in the face of the Court of Appeals of Maryland decision that the respondent's failure to seek medical care for her daughter when the need for such care was "obviously compelling and urgent," 276 Md. at 425, 348 A.2d at 280,

was sufficient to amount to "cruel and inhumane treatment" as "abuse" is defined in Article 27, Section 35A(b)7. It is evident that the Court of Appeals of Maryland would not require that the respondent know that her conduct would place the life of her child in jeopardy; rather, the State could and did prevail because the evidence demonstrated that the respondent acted in "wanton disregard" of the effects of her failure to obtain medical care for her daughter.

This difference in evidentiary sufficiency is much more than a matter of semantics. Under the ruling of the circuit court, the State would have to prove that the respondent knew that the child's life hung in the balance based upon her decision whether to get medical assistance. Absent a confession or proof of some unique medical knowledge on the part of the respondent (or any parent or custodian who is charged with child abuse), the decision of the circuit court renders it virtually impossible to obtain a conviction of those persons whose actions are as "outrageous" (memorandum and order of the district court at 4) as those of the respondent in refusing medical assistance to her child for reasons having nothing whatsoever to do with the welfare of the child or the need for assistance.

With growing public awareness of the extent and viciousness of child abuse throughout the country, this holding promises to exonerate — in the face of a clear holding of Maryland's highest court to the contrary — those wrongdoers who are indifferent to the health or life support needs of their children.

As this Court has observed, "basic in a society stand[s] the interests of society to protect the welfare of children." *Prince v. Massachusetts*, 321 U.S. at 165. If the circuit court decision is permitted to stand these state interests and an important state law will be severely undermined.

II.

THE CIRCUIT COURT MISAPPLIED THIS COURT'S DUE PROCESS TEST FOR GAUGING THE EVIDENCE SUPPORTIVE OF A STATE CONVICTION AND ABUSED THE LIMITATIONS OF THE HABEAS CORPUS REMEDY TO CONCLUDE THAT NO EVIDENCE WARRANTED THE RESPONDENT'S CONVICTION OF CHILD ABUSE.

In this case the circuit court has *sua sponte* taken a constitutional mechanism reserved for extraordinary situations and misapplied it in an area where state court law-making and fact-finding are entitled to great deference.

In *Thompson v. Louisville*, 362 U.S. 199 (1960), this Court held that a conviction violates due process if the record upon which it is based is "totally devoid of evidentiary support." Application of this due process test almost always appears as an offshoot of a vagueness challenge to a state statute. *See, e.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Johnson v. Florida*, 391 U.S. 596 (1968). It frequently arises in cases where protected expression is allegedly also implicated. *Gregory v. City of Chicago*, 394 U.S. 111 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966). Resort to the doctrine occasionally involves construction of a state statute where state law is silent or state court construction is unavailable, *Thompson v. Louisville; Garner v. Louisiana*, 368 U.S. 157 (1961),[2] or scrutiny of the facts in the case. *Vachon v. New Hampshire*.[3]

[2] In Garner v. Louisiana, 368 U.S. 157, 174 (1961), Mr. Justice Frankfurter observed in concurrence:

> Whether state statutes are to be construed one way or another is a question of state law, final decision of which rests, of course, with the courts of the State. When as here those courts have not spelled out the meaning of a statute, this Court must extrapolate its allowable meaning and attribute that to the highest court of the State. We must do so in a manner that affords the widest latitude to state legislative power consistent with the United States Constituion.

[3] In Vachon v. New Hampshire, 414 U.S. 478 (1974), this Court accepted the construction of state law asset forth by

Finally, recent applications of the principle have engendered deep division in the Court. *See, e.g., Vachon v. New Hampshire; Johnson v. Florida.*

Nevertheless, the test set forth in *Thompson v. Louisville* is a stringent one. It does not turn on the sufficiency of evidence but on whether the conviction rests upon *any* evidence at all. 362 U.S. at 199. When the highest court of a state has spoken on a statute, the test does not sanction even minimal construction of the State's statute. Although it permits scrutiny of a record, it does not allow — much less mandate — reevaluation or second guessing of state court fact-finding. Moreover, no opinion of this Court has ever applied the doctrine in a federal habeas corpus case where state fact-finding is presumed correct, 28 U.S.C. § 2254(d), where expressions of state law by its highest court are absolutely binding, *Wainwright v. Stone,* 414 U.S. 21 (1973), and where the potential for undue federal interference in legitimate state interests is so great. *Francis v. Henderson,* 425 U.S. 536, 541-42 (1976).

In any event, the record in this case amply meets the *Thompson* test. As Chief Judge Haynsworth noted in his dissent:

> There can be no doubt here that the multiple bruises were not symptomatic of influenza. When the neighbor saw the child, she was moaning in pain. That and her comatose condition should have signalled a more serious condition than the flu. That the mother recognized that there may have been internal injuries is supported by the testimony that she explained the child's bruised condition to the neighbor by saying, "Tommy hits hard."
>
> One may suppose that this three-year old child had told her mother who had beaten her, and the record clearly indicates that Tommy Crockett was the lover of both of the women who shared the house with him. Thus, she explained to the neighbor that she had not sought a physician's help because she was ashamed of the bruised condition of the child's body and that if the child were seen by a physician she would have to explain the origin of the bruises.
>
> I put no great weight on her exclamation after being informed that the child was dead, "I killed her," but her statements to the neighbor before the child was dead of her reasons for not having sooner sought medical help furnished support for a finding that for some hours the mother consciously refrained from seeking medical help to protect Crockett from possible criminal charges and to support her own ego.

583 F.2d at 701.

The petitioner submits that in light of this record the circuit court's application of the due process test for gauging evidence supportive of a state conviction conflicts with decisions of this Court and "has so far departed from the accepted and usual course of judicial proceedings" so as to call for exercise of this Court's federal court supervisory power. Rule 19 of the Supreme Court.

III.

THE CIRCUIT COURT LACKED HABEAS CORPUS JURISDICTION TO VOID THE RESPONDENT'S CONVICTION ON A DUE PROCESS GROUND NOT RAISED IN STATE COURTS.

It is indisputable that the due process evidentiary question decided by the circuit court was not presented to the Maryland courts. It is also evident that the issue was not raised amid the respondent's allegations of constitutional deprivations in her 1976 petition for a writ of certiorari in this Court, despite the fact that her vagueness contentions should have made her aware of the question.[4]

[4] As is noted earlier, *ante* at 13, the *Thompson* issue almost invariably arises in the context of a vagueness attack on a state statute.

New Hampshire's highest court, unlike the circuit court's action in the present case where it ignored the plain language of the Court of Appeals of Maryland.

The issue was not even raised in the district court where the respondent filed her petition for a writ of habeas corpus. Indeed, the question only saw the light of day when it was raised for the first time by the circuit court at the argument of this case.

Finally, in light of the respondent's vociferous state law challenge to the sufficiency of the evidence supporting her conviction in the Maryland courts, the due process evidentiary question was obviously ripe for presentation there. Under these circumstances, the respondent should be deemed to have waived the due process question, thus precluding collateral attack on the issue in federal habeas corpus proceedings. *Fay v. Noia*, 372 U.S. 391, 433 (1963).

CONCLUSION

The circuit court's reaching out for the constitutional issue presented here, as well as its reinterpretation of the Maryland Child Abuse Law and reevaluation of the facts of the respondent's case as found by the State's highest court, evidence a mistrust of state courts which this Court soundly rejected in *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). In an exercise of raw power without precedent, the circuit court has placed the Maryland Child Abuse Law into an ill-fitting and ill-advised federal straightjacket in total disregard of the law's interpretation by the Court of Appeals of Maryland, the State's highest court. Thus, the present case stands out as an unfortunate and anomalous trespass of federal authority into state affairs, an intrusion which only this Court can rectify.

For these reasons, review by this Court of the circuit court decision is both necessary and appropriate.

Respectfully submitted,

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APPENDIX

Opinion
(Decided February 21, 1975)

Court of Special Appeals of Maryland

No. 500, September Term, 1974

Virginia Lynnette Fabritz,
Appellant,
v.
State of Maryland,
Appellee.

(24 Md. App. 708)

OPINION

LOWE, J., delivered the opinion of the Court.

Virginia Lynnette Fabritz, a twenty year old mother, was tried by a jury in the Circuit Court for Calvert County for child abuse and assault and battery upon her now deceased daughter, Windy Lynn Fabritz.[1] The State conceded, and the judge acknowledged in his instructions to the jury, that:

> "The State has not attempted to prove in this case that the Defendant struck the blows or applied the

[1] Although the names of appellant and her daughter are spelled various ways throughout the record, the spelling used here is that of the indictment.

> blunt trauma as the doctor referred to it which caused the injuries, the initial injuries to this child and set in train the physical changes which ultimately resulted in its death."

To the contrary, the evidence clearly showed that the child was in the custody of another at the time the injury was inflicted[1a] and a polygraph examination verified not only that she had not inflicted the injury, but that she did not know who did inflict it, nor suspect that it was going to happen.[2] Indeed her pastor, the

[1a] Thomas Crockett — a co-defendant in whose custody Windy was during the two day period culminating in her injuries — was subsequently tried but acquitted for lack of evidence.

[2] Defendant's exhibit No. 1, admitted without objection, contained the results of a Polygraph Examination conducted by the Maryland State Police. Of the six possible results, *viz*, 1) truthfulness, 2) deception, 3) inconclusive reaction, 4) statement obtained, 5) referred to be examined or 6) re-examination requested, all answers to relevant questions "indicated truthfulness." The report commences by stating the purpose of the examination:

> "Mrs. Fabritz is brought to polygraph to ascertain if she is any way involved in the death of her 3-year old daughter."

After responding that she intended to answer truthfully each question, she denied hitting or causing the child's death by hitting. The examiner stated:

> "It is the opinion of the examiner that the above questions were answered truthfully."

As the examination progesssed she was also asked the following additional relevant questions:

> "34. Regarding the death of Wendy at the very time that Wendy was struck in the stomach were you, yourself, present?
>
> Answer: No
>
> 35. Regarding the death of Wendy did you, yourself, hit Wendy in the stomach?
>
> Answer: No
>
> 32. Regarding the death of Wendy do you know for sure who struck Wendy in the stomach?
>
> Answer: No

associate pastor of St. Paul's United Church of Christ, indicated that "She [M's. Fabritz] had a good relationship with Windy, Windy loved her and she loved Windy. It was obvious both vocally and by non-verbal communication"; and the Social Services Representative with the Department of Human Resources, who had known and worked with M's. Fabritz and Windy for a year described the mother-dauther relationship as a very good one.

> "She always seemed concerned about Windy. I never even saw her angry at Windy. They seemed to be in good relation, they seemed to love each other very much and she always seemed concerned about the child's welfare. And always knew pretty much what the child was doing and exactly where the child was."

The trial judge entered a judgment of acquittal as to the assault and battery, having found "no evidence in this case of any hitting or assaulting of the child by this Defendant."

The child abuse question, however, was permitted to go to the jury. The judge said:

> "With respect to the analysis of the evidence as it applies to the abuse statute, we think that the statute intends to make a criminal act any positive

> 31. Regarding the death of Wendy do you suspect anyone in particular of striking her in the stomach?
>
> Answer: No
>
> 41. Regarding the death of Wendy are you deliberately holding back any information about that?
>
> Answer: No
>
> 42. Regarding the death of Wendy, before she was actually struck did you already know it was going to happen?
>
> Answer: No
>
> * * * * * *
>
> It is the opinion of the examiner that above tests were also answered truthfully."

The issue of admissibility of polygraph results is not before us and we venture no opinion thereon.

> abuse or any actions by a custodian of a child which amount to cruel or inhumane tratment. . . . And the view the Court takes of the matter, a person who has the custody of an infant has a two-fold duty, that is to refrain from actively injuring the child himself which is an act which ought not to be done as well as an obligation which can not be avoided to take positive action to protect and care for the child. Those positive actions fall into several categories to provide it with necessary shelter and the necessary sustenance to sustain life as well as that medical attention which is available to protect if from the consequences of injuries no matter how received."

The judge concluded that to permit a child who is obviously seriously injured to expire from want of readily available attention, may in a given circumstance constitute "cruel and inhumane treatment," borrowing that phrase from the child abuse statute:

> "It is unquestionably inhumane to permit someone who is unable to care for itself and provide for its own medical attention to expire for want of that medical attention and in this case, the testimony shows that, although it became progessively less and less, there was a chance for this child to survive at any point from the time the Defendant returned home until very close to the time it expired, had it been brought to the attention of the medical authorities. This was not done and we think the question of whether or not that, in the facts of this case, is a criminal offense turns essentially upon the finding of the fact by the jury."

As previously noted there was no evidence that M's. Fabritz inflicted Windy's injury. Thus the actions upon which the verdict was based occurred during the eight hour period when Windy was in her mother's presence. M's. Fabritz bathed Windy twice (once with alcohol), put her night clothes on, tried to feed her, took her temperature and finally tried to call a doctor. During that period, she had to have observed the child's badly

bruised body, as did a neighbor who assisted her. In the eighth hour after arrival home Windy convulsed and was rushed to the hospital. She was pronounced dead on arrival, death having been caused by peritonitis resulting from a blow to the stomach. The State's "cruel and inhumane treatment" theory rested on appellant's failure to seek professional medical help until the child convulsed and death was imminent.

The jury found M's. Fabritz guilty of child abuse and the judge sentenced her to five years imprisonment. We do not find the evidence sufficient to sustain that conviction under the language of the statute as repeated in the indictment. See n. 4, *infra*.

The judge's opinion in denying the motion for judgment of acquittal and his instructions to the jury interpreted the child abuse statute, Md. Code, Art. 27, Sec. 35A, as applying to a person's failure to act to prevent aggravation of an injury. We cannot read that interpretation into the language of the Act.

At the time of the offense the pertinent language was that enacted by Chapter 835 of the Laws of Maryland, 1973. Although it was again amended the following year the change is not here pertinent. The relevant language of Chapter 835 read:

> *"Penalty. — Any parent,* adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision *of a minor child* under the age of eighteen years *who causes* abuse to such minor child shall be guilty of: a felony and upon conviction shall be sentenced to not more than fifteen years in the penientiary. . . ."
>
> "*'Abuse'* shall mean *any physical injury or injuries* sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child." [Emphasis added]

Basic to proof of the corpus delicti is a showing that the accused is among the named persons to whom the Act applies (here appellant was the parent) and secondly that such person *caused* the injury sustained by the child. This meaning is readily apparent by substituting the definition of "abuse" for the word "abuse" as it appears in the penalty section so that it reads in relevant part as follows:

> "Penalty. — Any parent, . . . of a minor child . . . who causes . . . [any physical injury or injuries] to such minor child shall be guilty of: a felony. . . ."

We need nothing in this statute, nor its history, which might suggest the Legislature's intent to encompass those parents, etc. who withhold from their children the necessities of life which the Court of Appeals has interpreted as including medical care, *Craig v. State*, 220 Md. 590, 596.

Prior to 1973 the statute did not use nor define the term "abuse." It penalized any person within the enumerated categories:

> ". . . who maliciously beats, strikes or otherwise mistreats such minor child to such degree as to require medical treatment. . . ."

Although the phraseology was somewhat altered by the revised version contained in House Bill 1056, adopted in 1973, as Chapter 835, the express purpose of the revision was to encourage the reporting of instances of abuse and only incidentally to rearrange and revise the language thereof. This view is substantiated by the title which is constitutionally required to describe the content of the bill,[3] Md. Constitution, Art. III, § 29.

[3] The descriptive portion of the title reads:

> ". . . to provide certain definitions in the child abuse law and to mandate the reporting of suspected child abuse to certain agencies, and providing for cooperative efforts by certain agencies in cases of child abuse, and extending immunity to persons who report child abuse cases in good faith, and generally clarifying and extending the law relating to child abuse."

and the purposes expressed in the newly adopted preamble.[4]

We conclude that to be guilty under the statute, the accused must be shown to have caused the injury, not simply aggravated it by failure to seek assistance. Our review of the record compels us to remark upon our concern that the State has been unable to apprehend and punish the execrable wretch who committed this unbelievably vicious act. The alternative of turning to the tangentially culpable mother, whose judgment was so unwise that her child's death may well have been the result, seems somehow unfulfilling. The sentence for her hesitancy during that eight hour period will not end after five years as would the sentence formerly imposed.

Judgment reversed.
Costs to be paid by Calvert County.
Mandate to issue forthwith.

[4] The preamble reads:

> "purpose. — The General Assembly hereby declares as its Legislative intent and purpose the protection of children who have been the subject of abuse by mandating the reporting of suspected abuse. By extending immunity to those who report in good faith, by requiring prompt investigations of such reports and by causing immediate, cooperative efforts by the responsible agencies on behalf of such children."

The mandate to report, whether applicable here or not, was not the crime with which appellant was charged. The indictment charged that M's. Fabritz:

> ". . . did unlawfully abuse, Windy Lynn Fabritz, a minor child under the age of eighteen years, by inflicting physical injuries sustained as a result of cruel and inhumane treatment, or as a result of malicious acts or acts,. . . ."

Opinion

(Decided December 3, 1975)

Court of Special Appeals of Maryland

No. 29, September Term, 1975

State of Maryland,
Appellant,
v.
Virginia Lynnette Fabritz,
Appellee.

(276 Md. 416)

MURPHY, C. J., delivered the opinion of the Court. O'DONNELL, J., dissents and filed a dissenting opinion at page 426 *infra*.

Maryland Code (1971 Repl. Vol., 1975 Cum. Supp.), Art. 27, § 35A(a) provides that any parent or other person having custody of a child under eighteen years of age "who causes abuse to such minor child" shall be guilty of a felony. The statute defines the term "abuse" in subsection (b)7 to mean:

> "any physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts. . . ."

Virginia Lynnette Fabritz (Virginia) was charged with violating this statute by abusing her three-and-one-half-year-old daughter Windy. Evidence adduced at the trial before a jury in the Circuit Court for Calvert County showed that Windy was brought to the Calvert County Hospital at 10:35 p.m. on October 3, 1973 in a

badly beaten condition with approximately seventy bruises or contusions covering her body, ranging in size from one inch to five inches. She was pronounced dead on arrival at the hospital, her death being attributed to peritonitis resulting from a perforated or ruptured duodenum. The evidence showed that Windy's injuries were the result of "blunt trauma" caused by an instrument, or a fist, or some kind of blow inflicted within eighteen to twenty-four hours prior to her death.

Virginia had left Windy in the custody of Thomas Crockett and his wife Ann, with whom she resided, on October 1. Virginia did not see Windy again until 1 p.m. on October 3, at which time she noticed that Windy was very listless. Crockett told her that Windy had driven with him on his motorcycle and had gotten sick as a result of a bumpy ride. At 2:30 p.m. Windy complained of cramps and was running a slight fever; Virginia attributed this to the flu. She then bathed Windy and, after observing her badly beaten body, put her to bed and spent the remainder of the afternoon watching Crockett work on his motorcycle. At 5 p.m. Virginia obsered that Windy appeared to be in a semiconscious state, but she did not take her to the hospital because she "was too ashamed of the bruises on her daughter's body." There was evidence that Windy thereafter sat up and appeared normal for a brief period, but at 6 p.m. she vomited and again complained that she did not feel well. At 7 p.m. Virginia put Windy back to bed and called a friend, Connie Schaeffer, and asked that she look at Windy. Miss Schaeffer arrived at 9 p.m. Windy was lying on the floor of the den, covered by a wet diaper. She was limp and appeared unconscious. When Miss Schaeffer questioned Virginia about the bruises on Windy's body, Virginia responded, "Tommy [Crockett] hits hard." Windy's condition worsened and at 9:45 p.m. Ann Crockett contacted the hospital. She was advised to bring Windy to the hospital immediately. After Mrs. Crockett left for the hospital with Windy, Virginia told Miss Schaeffer, "It is my fault. I killed her." Shortly thereafter, Virginia went to the hospital and learned that Windy was dead.

Expert medical evidence was adduced to show that a child with peritonitis would vigorously complain once she sustained the injury and would continue to complain until the onset of a coma; that at the time the injuries were sustained, there would have been immediate pain and the child would have begun to feel poorly; that the pain would have gradually increased, followed by fever, vomiting, and lack of appetite; that within six hours prior to death, the child would have become stuporous and comatose; that Windy would have lived had an operation been performed within at least twelve hours prior to death; and that she would have had a chance to survive if surgery had been performed up to an hour before death. A pathologist testified that it was his medical opinion, based upon the degree of injury, the multiplicity of wounds and his examination of Windy's body, that the injuries did not happen accidentally. There was no evidence indicating that Virginia struck the blows which caused the initial injuries to her child, nor was there any evidence to show that Virginia had knowledge that the person in whose custody she left Windy would abuse her.

The trial court instructed the jury that a parent is under an affirmative duty to provide reasonable medical necessities to his child and would be guilty of child abuse under the statute if the treatment afforded to the child was "cruel or inhumane and it results in physical injury"; that the "physical injury may be death itself"; and that "the unattended worsening of obvious serious medical condition if cruel or inhumane and if more serious consequences result, is in itself . . . a physical injury within the meaning of the terms as they are used in the Statute." The jury found Virginia guilty of the offense and she was sentenced to five years' imprisonment.

The Court of Special Appeals reversed the judgment of conviction, holding that "to be guilty under the statute, the accused must be shown to have caused the injury, not simply aggravated it by failure to seek assistance." *Fabritz v. State*, 24 Md. App. 708 at 714,

332 A.2d 324 at 327 (1975). In so concluding, the court said that there was nothing in the statute indicating that it was the legislative intent to encompass within its provisions parents who withhold the necessities of life, including medical care, from their children. We granted certiorari to consider whether the Court of Special Appeals properly interpreted the child abuse statute.

The State contends that Virginia's failure to provide medical care to Windy in the circumstances of this case amounted to child abuse within the meaning of the statute. More specifically, the State urges that the evidence showed that Windy was the victim of a medical condition known as the "battered child syndrome"; that the beating Windy suffered caused peritonitis which resulted "in a gradual and continuous general deterioriation of the child's health and well-being culminating in her death"; that although there was no evidence that Virginia was the individual who beat Windy, she was "fully aware of her child's beaten condition . . . [but] failed for a period of several hours to seek medical attention for her child and . . . her inaction amounted to child abuse"; and that while there was no evidence that Windy's injuries resulted from any "malicious act" perpetrated by Virginia, her failure to obtain medical attention for her daughter constituted, within the sense contemplated by the statute, "cruel or inhumane treatment" and was a contributing cause of the "physical injury" which the child sustained.

On Virginia's behalf it is argued that to be guilty of child abuse under § 35A, a person must have "caused" the child to suffer physical injury as a result of cruel or inhumane treatment. Virginia claims that § 35A "concerns injuries as a result of the treatment or acts of the accused" and that because Windy was injured and died as a consequence of blows inflicted by someone other than herself, her failure to obtain medical aid for Windy was not the cause of the child's injuries or death. Virginia maintains that the gist of the statutory offense

of child abuse is not cruel or inhumane treatment but rather the infliction of physical injuries upon a child as a result of such treatment.

The cardinal rule in the construction of statutes is to effectuate the real and actual intention of the Legislature. *Purifoy v. Merc.-Safe Dep. & Trust,* 273 Md. 58, 327 A.2d 483 (1974); *Scoville Serv., Inc. v. Comptroller,* 269 Md. 390, 306 A.2d 534 (1973); *Height v. State,* 225 Md. 251, 170 A.2d 212 (1961). Equally well settled is the principle that statutes are to be construed reasonably with reference to the purpose to be accomplished, *Walker v. Montgomery County,* 244 Md. 98, 223 A.2d 181 (1966), and in light of the evils or mischief sought to be remedied, *Mitchell v. State,* 115 Md. 360, 80 A.2d 1020 (1911); in other words, every statutory enactment must be "considered in its entirety, and in the context of the purpose underlying [its] enactment," *Giant of Md. v. State's Attorney,* 267 Md. 501 at 509, 298 A.2d 427, at 432 (1973). Of course, a statute should be construed according to the ordinary and natural import of its language, since it is the language of the statute which constitutes the primary source for determining the legislative intent. *Grosvenor v. Supervisor of Assess.,* 271 Md. 232, 315 A.2d 758 (1974); *Height v. State, supra.* Where there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intention of the Legislature. *Purifoy v. Merc.-Safe Deposit & Trust, supra.* Thus, where statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, courts are not at liberty to disregard the natural import of words with a view towards making the statute express an intention which is different from its plain meaning. *Gatewood v. State,* 244 Md. 609, 224 A.2d 677 (1966). On the other hand, as stated in *Maguire v. State,* 192 Md. 615, 623, 65 A.2d 299, 302 (1949), "[a]dherence to the meaning of words does not require or permit isolation of words from their context '* * * [since] the meaning of the plainest words in a statute may be controlled by the context. . . .'" In

construing statutes, therefore, results that are unreasonable, illogical or inconsistent with common sense should be avoided whenever possible consistent with the statutory language, with the real legislative intention prevailing over the intention indicated by the literal meaning. *B. F. Saul Co. v. West End Park,* 250 Md. 707, 246 A.2d 591 (1968); *Sanza v. Md. Board of Censors,* 245 Md. 319, 226 A.2d 317 (1967); *Height v. State, supra.*

It is, of course, well settled that penal statutes must be strictly construed, *State v. Fleming,* 173 Md. 192, 195 A. 392 (1937), "by which is meant that courts will not extend the punishment to cases not plainly within the language used," *State v. Archer,* 73 Md. 44, 57, 20 A. 172, 172 (1890). But as our predecessors noted in *Healy v. State,* 115 Md. 377, 379, 80 A. 1074, 1075, it is the intention of the Legislature that governs in the construction of all statutes so that penal statutes, like other statutes, are to be fairly and reasonably construed and courts should not, by narrow and strained construction, exclude from their operation cases plainly within their scope and meaning. In the final analysis, in construing any statute requiring construction, courts must consider not only the literal or usual meaning of words, but their meaning and effect in light of the setting, the objectives and purposes of the enactment, with the real intention prevailing over the literal intention even though such a construction may seem to be contrary to the letter of the statute. *Criminal Ins. Comp. Bd. v. Gould,* 273 Md. 486, 331 A.2d 55 (1975); *Barnes v. State,* 186 Md. 287, 47 A.2d 50 (1946); *Height v. State, supra.*

It is in light of these principles of construction of statutes that we consider the provisions of § 35A as they stood at the time of the alleged offense. Codified under the subtitle "Child Abuse," the statute's declared legislative purpose is "the protection of children who have been the subject of abuse. . . ." As heretofore indicated, the statute defines "abuse" to encompass "any physical injury or injuries sustained by a child as

a result of cruel or inhumane treatment or as a result of malicious act or acts." Under the statute, any person having custody of a child under eighteen years of age who "causes" such abuse is guilty of a felony. The precursor to § 35A was chapter 743 of the Acts of 1963, which was originally codified as Code (1957) Article 27, § 11A and included under the subtitle "Assault on Children"; that statute, which was recodified as Article 27, § 35A by chapter 500 of the Acts of 1970, provided that any person having custody of a minor child under fourteen years of age "who maliciously beats, strikes or otherwise mistreats such minor child to such degree as to require medical treatment" would be guilty of a felony. It would appear from its terms that that enactment was not intended to reach acts of individuals not constituting, in one form or another, an assault on a child. It was not until § 35A was amended by chapter 835 of the Acts of 1973 that the Legislature repealed the "maliciously beats, strikes, or otherwise mistreats" test of child abuse, and substituted in its place a new and different measure of the offense — one defined by new subsection (b) 7 in terms of physical injuries caused by "cruel or inhumane treatment or as a result of malicious act or acts." According to its title, one of the purposes underlying the 1973 amendment of § 35A was "generally extend[ing] the law of child abuse." Considering the particular use and association of words and definitions used in § 35A, we think a doubt or ambiguity exists as to the exact reach of the statute's provisions, justifying application of the principle that permits courts in such circumstances to ascertain and give effect to the real intention of the Legislature. *See Clerk v. Chesapeake Beach Park,* 251 Md. 657, 248 A.2d 479 (1968); *Domain v. Bosley,* 242 Md. 1, 217 A.2d 555 (1966).

We think it evident that the Legislature, by its 1973 amendment to § 35A, plainly intended to broaden the area of proscribed conduct punishable in child abuse cases. Its use in the amended version of § 35A of the comprehensive phraseology "who causes abuse to" a

minor child, coupled with its broad two-pronged definition of the term "abuse," supports the view that the Legislature, by repealing the narrow measure of criminality in child abuse cases then provided in § 35A, and redefining the offense, undertook to effect a significant change of substance in the scope of the statute's prohibitions. In making it an offense for a person having custody of a minor child to "cause" the child to suffer a "physical injury," the Legislature did not require that the injury result from a physical assault upon the child or from any physical force initially applied by the accused individual; it provided instead, in a more encompassing manner, that the offense was committed if physical injury to the child resulted either from a course of conduct constituting "cruel or inhumane treatment" or by "malicious act or acts."

As defined in Black's Law Dictionary 966 (3rd ed. 1933), an injury is "[a]ny wrong or damage done to another . . ."; the term is defined in Webster's Third New International Dictionary 1164 (1961) as "an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm." Of course, the injury would be a physical one if it relates to or pertains to the body. To be a "cause" of physical injury to another, a person would in some manner have to be accountable for the "condition that brings about an effect or that produces or calls forth a resultant action or state." Webster's Third New International Dictionary 356. Affording the term "physical injury" the broad meaning that the context of § 35A would seem to mandate we think a parent would be criminally responsible as having "caused" such a physical injury to his child in the sense contemplated by the statute if, as a result of the parent's "cruel or inhumane treatment," the child suffered bodily harm additional to that initially sustained as a consequence of the injury originally inflicted upon him. *Cf. Palmer v. State,* 223 Md. 341, 164 A.2d 467 (1960), where in affirming an involuntary manslaughter conviction of a mother who knowingly

permitted her infant child to be subjected to prolonged beatings by her paramour, we concluded that although the direct and immediate cause of the child's death was attributable to blows struck by the mother's paramour, her failure to remove the child from the paramour's presence constituted gross and criminal negligence and "was a contributing cause of . . . [the child's] unfortunate death." 223 Md. at 353.

Whether, in view of the evidence adduced at the trial, Virginia's failure to obtain medical assistance for Windy constituted cruel or inhumane treatment resulting in physical injury to the child is, of course, the crux of this appeal. That a parent under Maryland law is legally obligated to provide necessary medical care to his child is clear. Code (1970 Repl. Vol.) Art. 72A, § 1; *Craig v. State,* 220 Md. 590, 155 A.2d 684 (1959); *Baltimore City v. Fire Insurance Salvage Corporation,* 219 Md. 75, 148 A.2d 444 (1959). That Virginia knew of Windy's severely beaten condition is manifest from the evidence; indeed, as the photographic exhibits in the case so painfully demonstrate, Windy bore the multiple bruises of a vicious assault, of which Virginia was aware at least as early as 2:30 p.m. on October 3, 1973. Between that hour, and 10:35 p.m. when Windy died, Virginia failed to seek or obtain any medical assistance although, as the evidence heretofore outlined so plainly indicates, the need therefor was obviously compelling and urgent. There was evidence that Virginia's failure to seek such assistance was based upon her realization that the bruises covering Windy's body would become known were the child examined or treated by a physician. Other evidence in the case all too graphically illustrated the suffering to which Windy was subjected by Virginia's failure to provide the treatment needed to save the child's life. We think the jury properly could have concluded from the evidence that, as a result of Virginia's conduct, Windy's condition was permitted to steadily deteriorate until the child's ordeal was ended by death; that Virginia's failure to act caused Windy to sustain bodily injury additional to and

beyond that inflicted upon her by reason of the original assault and constituted a cause of the further progression and worsening of the injuries which led to Windy's death; and that in these circumstances Virginia's treatment of Windy was "cruel or inhumane" within the meaning of the statute and as those terms are commonly understood. Accordingly, we conclude that the Court of Special Appeals was in error in its interpretation of § 35A and in its reversal of Virginia's conviction.

Judgment of the Court of Special Appeals reversing the judgment of the Circuit Court for Calvert County vacated; case remanded to the Court of Special Appeals for consideration of the other issues presented to that court on appeal, but not decided; costs to abide the result.

O'Donnell, J., dissenting:

Although I agree that the conduct of the 20-year old mother, Virginia Fabritz, toward her three-and-one-half-year-old daughter, was reprehensible, and that as a result of her attempt to treat the child with "home remedies," and her failure to more promptly seek medical attention, "Windy's condition was permitted to steadily deteriorate until the child's ordeal was ended by death," I cannot concur with the majority in finding her conduct to be within the proscription of Maryland Code (1957, 1971 Repl. Vol. [1975 Cum. Supp.]) Art. 27, § 35A(a). I would affirm the judgment of the Court of Special Appeals in *Fabritz v. State,* 24 Md. App. 708, 332 A.2d 324 (1975).

I fear that my distinguished colleagues may have been swayed by the photographic exhibits, which they describe as "painfully demonstrating" the multiple bruises Windy bore as a result of a "vicious assault," and which they find "too graphically illustrated the

suffering to which Windy was subjected by Virginia's failure to provide the treatment needed to save the child's life." It is a case such as this as brings forth the cogent observation of Wolfe, B., in *Winterbottom v. Wright,* 10 M. & W. 116 (1842), where he noted "hard cases, it has been frequently observed, are apt to introduce bad law."[1]

Art. 72, § 1 of the Code (1957, 1970 Repl. Vol. [1975 Cum. Supp.]) places upon a parent the duty to provide "support, care, nurture, welfare and education," for a child under eighteen years of age. Pursuant to this section, it is incumbent upon a parent to provide medical attention, when necessary, to a minor child, although the statute itself does not in specific terms mention "medical care."

The unintentional killing of another by the omission, through gross negligence, to perform a legal duty owing to him, was involuntary manslaughter at common law. *See* Clark & Marshall, "*Law of Crimes,* § 10.12 (6th ed. 1958). *See also* R. Perkins, "*Criminal Law,*" Ch. 2, § 1 (1969), at pp. 71-73. This principle has been well recognized in this state in both *Palver v. State,* 223 Md. 341, 164 A.2d 467 (1960), and *Craig v. State,* 220 Md. 590, 155 A.2d 684 (1959).

In *Craig,* Judge Prescott, writing for our predecessors, stated:

> "[I]t is almost universally recognized that where the defendant owed to a deceased person a specific legal duty, but failed to perform the same, and death resulted to the deceased because of the non-performance of the duty, (at least under circumstances where the failure to perform constituted gross and wanton negligence) the defendant is guilty of involuntary manslaughter. 1 *Warren, Homicide,* Sec. 122, states the principle rather succinctly, as follows:

[1] See also the observations of Holmes, J. in Northern Securities Co. v. United States, 193 U. S. 197, 400 (1904), that "great cases, like hard cases, make bad law. . . ."

> 'Where the defendant owed the deceased a legal or contractual duty, any omission of the duty resulting in the death of the deceased renders the defendant chargeable with manslaughter. The duty must have been a plain one which he was bound by law or contract to perform personally. A criminal intent is not a necessary element of the offense. The breach of duty need not have been a criminal offense.
>
> * * *
>
> 'The defendant is guilty of manslaughter where he neglected to provide his wife with necessaries or with medical attention, or an infant in his charge with medical attention;* * *' " [citations omitted]. 220 Md. at 596, 155 A.2d at 688.

Where however "the basis of the charge be felonious negligence . . . it must [be shown to] have been gross or criminal negligence." *Neusbaum v. State,* 156 Md. 149, 162, 143 A. 872, 877 (1928); "gross or criminal negligence" has been interpreted by this Court to mean "a wanton or reckless disregard for human life." *Craig v. State, supra,* at 597, 155 A.2d at 688, citing *Hughes v. State,* 198 Md. 424, 84 A.2d 419 (1951); *Thomas v. State,* 206 Md. 49, 109 A.2d 909 (1954); *Clay v. State,* 211 Md. 577, 128 A.2d 634 (1957).

Convictions for involuntary manslaughter of a husband and wife were reversed by our predecessors in *Craig v. State, supra.* There, the parents, because of their religious beliefs, treated their six-month-old child at home, "constantly and tenderly," without medical intervention, during an illness, later diagnosed as pneumonia, which proved to be fatal. Evidence at the trial was adduced however that prompt medical attention "may" have saved the child's life. After observing that "parents are vested with a reasonable discretion in regard to when medical attention is needed for their children," the Court stated:

> "If we assume that ordinarily careful and prudent parents would have called in medical aid during

> the initial stages of the child's illness, and, therefore, the defendants were guilty, at this time, of ordinary negligence in failing to call in a physician, we still find nothing in the testimony that would sustain a finding that during this early period of the child's illness the parents displayed 'a wanton or reckless disregard for' the child's life; and, if we assume that the seriousness of the child's illness was easily discernible to them in the last two or three days of its life, so that their failure, at that time, to call in medical aid did constitute gross negligence, the record fails to disclose that this failure was the proximate cause of the child's death, ..." 220 Md. at 598, 155 A.2d at 689.[2]

It is true that in *Palmer v. State, supra,* as the majority points out, there was no evidence that the mother of the child had inflicted any of the blows which were shown to be the direct and immediate cause of the child's death. Upon the facts, to all intents, the appellant was shown to have been a principal in the second degree, since she permitted her paramour to inflict "prolonged and brutal beatings" upon her twenty-months'-old child. Although the Court concluded that this "gross or criminal negligence" on her part was a contributing proximate cause of the child's death, our predecessors there, citing 1 Wharton, *Criminal Law and Procedure* Section 68 (Anderson Ed.), set forth the general rule that: "A person is only criminally liable for what he has caused, that is, there must be a casual relationship between his act and the harm sustained for which he is prosecuted." 223 Md. at 353, 164 A.2d at 474.

It goes without saying, that if the appellee had been shown not to have provided her child with medical

[2] There is a certain parallel between the facts in the instant case and those in Craig v. State, *supra;* in both cases the parents attempted, albeit unsuccessfully and negligently, to alleviate the child's suffering; in neither case were the respecvtive parents the initial cause of the child's malady.

attention through "gross or criminal negligence" — with "a wanton or reckless disregard for human life" — she would be subject to prosecution for common law involuntary manslaughter. *See* 21 Md. L. Rev. 262 (1961). The majority however undertakes to engraft upon the provisions of Art. 27, § 35A(a), the statute under which the appellee was charged,[3] the elements of the common law offense of involuntary manslaughter and reaches an equivalent result by equating the phrase "cruel or inhumane treatment" with "gross or criminal negligence" and by substituting the word "injury" with the term "death."

Penal statutes, those which command or prohibit certain acts and establish penalties for their violation, must be strictly construed in favor of the accused and against the state. *Wanzer v. State,* 202 Md. 601, 611, 97 A.2d 914, 918 (1953); *Weinecke v. State,* 188 Md. 172, 176, 52 A.2d 73, 74 (1947). The rule requiring a strict construction of such statutes means that the punishment proscribed will not be extended to cases not plainly falling within the language of the statute. *Smith v. Higinbothom,* 187 Md. 115, 130, 48 A.2d 754, 761 (1946); *State v. Fleming,* 173 Md. 192, 196, 195 A. 392, 393 (1937); *Healy v. State,* 115 Md. 377, 379, 80 A. 1074, 1975 (1911); *Mitchell v. State,* 115 Md. 360, 364, 80 A. 1020, 1022 (1911). It is thus fundamental that no person can be held for violating a criminal statute unless the act with which he is charged comes plainly within both the letter and the spirit of the statute under which the charge is laid. *State v. Sinclair and Sinwellan Corp.,* 274 Md. 646, 660, 337 A.2d 703, 712 (1975); *Fowel v. State,* 206 Md. 101, 106, 110 A.2d 524, 526 (1955).

As was stated in *Daniel Loughran Co. v. Lord Baltimore Candy and Tobacco Co.,* 178 Md. 38, 47, 12

[3] The indictment charged that the appellee ". . . did unlawfully abuse, Windy Lynn Fabritz, a minor child . . . by inflicting physical injuries sustained as a result of cruel and inhumane treatment, or as a result of malicious act or acts, ..."

A.2d 201, 205 (1940) "[t]he legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. 14 *Am. Jur.* 773, *"Criminal Law,"* sec. 19; 16 *C. J.* 67; *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322."

As the majority points out, Art. 27, § 35A(a) punishes, as a felony, any parent, or other person "who causes abuse to such minor child." "Abuse" is defined in subsection (b) 7 to mean: "[A]ny . . . physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts. . . ." The statute thus punishes any person who "causes [any physical *injury or injuries* [to be] sustained by a [minor] child as a *result of cruel or inhumane treatment* or as a *result of malicious act or acts*]. . . ." (emphasis added).

The majority, despite what appears to be the clear and unambiguous meaning of "physical injury or injuries," reads into the statute that the failure of the appellee to summon proper medical attention for her minor child, which they find to have been "cruel and inhumane treatment," resulting in a worsening of the child's condition and leading ultimately to her death, constituted "physical injury."

It is axiomatic that "[w]here the statutory language is plain and free from ambiguity and so expresses a definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended. The courts are not at liberty to surmise the legislative intention to be contrary to the words and letters of the statute, or to insert or delete words with a view of making the statute express an intention which is different from its plain meaning." *Fowel v. State, supra,* at 105, 110 A.2d at 526. *See also Mitchell v. State, supra,* at 365, 80 A. at 1022. As stated in *Smith v.*

Higinbothom, supra, at 125, 48 A.2d at 759, "[w]here the language is clear and free from doubt, the Court has no power to evade it by forced and unreasonable construction in order to assert its own ideas of policy or morals."

It is inconsistent "with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity, [since] [t]he meaning of the law which [might] consign a man to prison . . . should be plain and obvious, and easily understood by an ordinary capacity." *James v. State,* 63 Md. 242, 253 (1885), where it is further stated: "[o]ur functions are limited to interpreting and enforcing the legislative will when it has been declared; and it would be very unwarrantable in us to permit any private sentiments of our own to affect the construction which we give to these status." 63 Md. at 254.

It seems to me to be only by a "keen and scholastic ingenuity" that the majority is able to read into the phrase "physical injury or injuries," an interpretation that this means a worsening or deterioration of a physical condition which results in death. Such a construction seems clearly contrary to the precept that "[c]ourts are not at liberty to insert or delete words with a view toward making the statute express an intention which is different from its plain meaning." *Gatewood v. State,* 244 Md. 609, 617, 224 A.2d 677, 682 (1966); *Fowel v. State, supra,* at 105, 110 A.2d at 526.

At no place does the legislature suggest that such a construction was intended. Prior to the amendment of the statute by Ch. 835 of the Laws of 1973, the statute penalized any person "who maliciously beats, strikes or otherwise mistreats such minor child to such degree as to require medical treatment." As the Court of Special Appeals pointed out, "the express purpose of the [1973] revision was to encourage the reporting of instances of abuse and only incidentally to rearrange and revise the language thereof." 24 Md. App. at 713, 332 A.2d at 327. There is nothing in the Title to the Act, nor in its

preamble, to justify the interpretation here reached by the majority. *See Fabritz v. State, supra,* at 714, nn.3 and 4, 332 A.2d at 327, nn.4 and 5.

"Death," as defined in Webster's New International Dictionary (2d ed. 1948), is "[t]he cessation of all vital functions without capability of resuscitation; . . . [the] act or fact of dying." The statute punishes one who causes "physical injury" — not one who causes death — by conduct which is "cruel or inhumane," or by a "malicious act or acts."

Ascribing to the legislature a knowledge of the existing law as to involuntary manslaughter, applied in *Palmer v. State, supra,* and in *Craig v. State, supra,* I cannot see how it could have intended, when it revised in 1973, the provisions of Art. 27, § 35A(a), as limited by the definition of "abuse" in subsection (b)7, to supersede the common law of manslaughter, and indeed to apply a different penalty, where a parent, by criminal negligence fails to promptly provide its minor child with medical care and thus contributes to the death of the child.

The acts of the mother here, although theoretically criminally negligent were not such as to cause "physical injury" to her daughter; those injuries had already been inflicted by a third party.[4] Although her failure to more promptly seek medical aid may have contributed to the "act of dying" and have hastened the "cessation of all vital functions," such failure on her part did not *cause* any "physical injury or injuries" as those terms are well defined. The statute, clearly intending to punish acts falling outside the common law of assault, but short of manslaughter, undertook to proscribe

[4] The appellee was acquitted of "assault and battery," the trial court finding "no evidence in this case of any hitting or assaulting of the child by this defendant." A co-defendant, Thomas ("Tommy") Crockett, in whose custody the minor child had been, during the two-day period when she sustained her physical injuries was subsequently tried and acquitted for lack of evidence.

"cruel and inhumane treatment" or "malicious act or acts" which directly result in "physical injury or injuries" to such a child. Although Virginia Fabritz' non-feasance in performing a legal duty she owed her daughter, may have subjected her to a prosecution for manslaughter, her conduct was without the language and obvious intention of the statute invoked.

I agree with the conclusion reached by the Court of Special Appeals "that to be guilty under the statute, the accused must be shown to have caused the injury, not simply [to have] aggravated it by failure to seek [medical] assistance." 24 Md. App. at 714, 332 A.2d at 327.

Secondarily, even though I concur with the view of the majority, that an offense under the statute is committed "if physical injury to the child resulted either, from a *course of conduct* constituting 'cruel and inhumane treatment,' or by 'malicious act or acts,'" I cannot agree that under the facts of this case, the failure of the appellee — over a period of approximately eight hours — to seek out medical attention constituted such a "course of conduct." As I read the statute, the term "cruel and inhumane," in juxtaposition with the words "malicious act or acts," implies for its application, an element of malice equivalent to an act or acts shown to be "malicious" and requires a scienter to cause the child to suffer physical injury. Since the object of the statute proscribes wanton acts causing physical injury to such a minor child, it was not within the intent of the statute to punish one for having made a poor and even negligent attempt at treatment, albeit made in good faith.

There is no evidence that the appellee's negative action in failing to more promptly obtain medical assistance imputed to her any intent to permit the child to continue to suffer or to die. When she noticed that the child was in a semi-conscious state, she fed her liquids to give her strength. Upon noticing a deterioration in her physical condition, she called upon a friend to

assist her. The child was then bathed with alcohol, her temperature taken and she was dressed in pajamas. Thereafter, a volunteer fire company ambulance was called and the child was taken to the hospital. Although deficient, the treatment attempted, with obvious negligence, by the appellee was in no way intended to cause her daughter any greater suffering, or death. As in *Craig v. State, supra,* the choice made by the appellant was the wrong one; even though it may have constituted an abnegation of her parental duty and an abuse of parental discretion, such failure to seek medical care was not intended to cause, or inflict, any "physical injury."

Although facts which might establish a continuing "course of conduct of cruel and inhumane" treatment, resulting in "physical injury" to a minor child may be visualized, we do not have such evidence here. There is no suggestion in the evidence that the appellant had ever assaulted, beaten or abused the child or treated it cruelly or inhumanely. We have only the mother's failure to promptly summon medical aid, coupled with expert testimony that with surgical intervention — as much as an hour before death — the child "would have had a chance to live." The appellee's negative conduct in this regard, without any showing of malice or scienter, did not constitute "cruel and inhumane treatment" as contemplated within the terms of the statute.

I would reverse the judgment of the Circuit Court for Calvert County.

Opinion

(Decided January 28, 1976)

Court of Special Appeals of Maryland

No. 500 (on remand)
September Term, 1974

Virginia Lynnette Fabritz,
Appellant,

v.

State of Maryland,
Appellee.

(30 Md. App. 1)

LOWE, J., delivered the opinion of the Court.

The facts surrounding the conviction of Virginia Lynette Fabritz for child abuse, by a jury of the Circuit Court for Calvert County, are detailed in our reports, *Fabritz v. State,* 24 Md. App. 708, and in those of the Court of Appeals, *State v. Fabritz,* 276 Md. 416. Suffice to say that her conviction and sentence to 5 years imprisonment were founded upon facts showing that Mrs. Fabritz had neglected to "seek or obtain any medical assistance" for her daughter for a period of eight hours after she should have known, as the Court of Appeals viewed the evidence, that the need therefor was compelling and urgent. 276 Md. 416 at 425.

Our opinion of the intent of the Legislature in enacting the child abuse statute was that an accused must be shown to have *caused* the injury to be guilty of child abuse, "not simply aggravated it by failure to seek

assistance." 24 Md. App. 714. The Court of Appeals disagreed. It held that ". . . a parent would be criminally responsible as having 'caused' such a physical injury to his child in the sense contemplated by the statute if, as a result of the parent's 'cruel or inhumane treatment,' the child suffered bodily harm additional to that initially sustained as a consequence of the injury originally inflicted upon him." 276 Md. at 424. What was meant by cruel and inhumane treatment within the meaning of the statute was "as those terms are commonly understood." In the case at bar, the jury below "commonly understood" the terms to mean the failure of a parent to seek or obtain medical assistance for her daughter for eight hours after she had reason to know the daughter had been injured. The Court of Appeals held that the evidence was sufficient to convict under the statute as that Court interpreted it. The Court of Appeals then remanded the case to us for consideration of two other issues that had been presented upon appeal.

Instructions

Appellant set forth two complaints regarding the instructions. The first is clearly answered by the opinion of the Court of Appeals.

Appellant complained that the trial judge erroneously instructed the jury, that if it found that Windy's death had resulted from appellant's cruel or inhumane treatment, the death could be the resulting injury contemplated in the definition of abuse in Md. Code, Art. 27, § 35A. The appellant contends there was no testimony before the jury upon which it could have made such a finding, and the court's instructions permitted the jury to speculate on the proximate cause of Windy's death. That issue was considered pointedly and implicitly answered by the Court of Appeals. After determining that the Legislature intended that withholding treatment could "cause" a physical injury if such action was cruel and inhumane, the Court proceeded to point out that the crux of the appeal was

> "[w]hether, in view of the evidence adduced at the trial, Virginia's failure to obtain medical assistance for Windy constituted cruel or inhumane treatment resulting in physical injury to the child. . . ."

In answering its question, the Court also answered appellant's:

> "We think the jury properly could have concluded from the evidence that, as a result of Virginia's conduct, Windy's condition was permitted to steadily deteriorate until the child's ordeal was ended by death; that Virginia's failure to act caused Windy to sustain bodily injury additional to and beyond that inflicted upon her by reason of the original assault and constituted a cause of the further progression and worsening of the injuries which led to Windy's death; and that in those circumstances Virginia's treatment of Windy was 'cruel or inhumane' within the meaning of the statute and as those terms are commonly understood." 276 Md. at 425-426.

We are given less direct guidance by the Court upon appellant's other instructional complaint, but find the answer in its opinion nonetheless. At the conclusion of the court's instructions to the jury, the appellant made the following request for an additional instruction concerning the principle of gross negligence.

> "Mr. Dorsey: Then we would also ask that in order for the jury to determine that the Defendant was guilty of cruel and inhuman punishment, if they accept—
>
> Judge Bowen: Cruel and inhumane treatment.
>
> Mr. Dorsey: Cruel and inhumane treatment, rather, assuming the Court to be correct by saying death itself would be the physical injury. I would like the Court to advise the jury that the failure to provide the medical attention must have been to constitute cruel and inhumane treatment, must be of such an aggravated nature as to shock the conscience of a reasonable amount to, *amounting*

to gross negligence amounting to almost a wilful act.

Judge Bowen: We are not talking about negligence we are talking about something that is life threatening that could produce serious bodily harm.

Mr. Dorsey: Well it didn't come across to me that way Your Honor." (Emphasis added).

Although awkwardly articulated, that request adequately preserved the issue of whether appellant was entitled to an instruction commensurate with the definition of gross or criminal negligence, *i.e.,* a "wanton and reckless disregard of human life." *Hughes v. State,* 198 Md. 424, 432.

Appellant relied on *Craig v. State,* 220 Md. 590 which is apposite factually. There, both parents of a child who died from pneumonia were convicted of involuntary manslaughter for withholding medical aid for 2 or 3 days after the seriousness of the child's illness became apparent. That their withholding of medical aid was predicated upon their religious beliefs (although indicative of an intentional denial of medical aid) was considered by the Court to be

> ". . . beside the point, unless their gross and wanton negligence — ordinary negligence being insufficient — caused the child's death. We have pointed out above that parents are vested with a reasonable discretion in regard to when medical attention is needed for their children. If we assume that ordinarily careful and prudent parents would have called in medical aid during the initial stages of the child's illness, and, therefore, the defendants were guilty, at this time, of ordinary negligence in failing to call in a physician, we still find nothing in the testimony that would sustain a finding that during this early period of the child's illness the parents displayed 'a wanton or reckless disregard for' the child's life; and, if we assume that the seriousness of the child's illness was easily discernible to them in the last two or three days of

> its life, so that their failure, at that time, to call in medical aid did constitute gross negligence, the record fails to disclose that this failure was the proximate cause of the child's death, because, as above noted, the doctors stated that it would then have probably been ineffective to control the disease." *Craig v. State,* 220 Md. at 598-599.

The *Craig* Court then held that the evidence was insufficient to sustain a finding that gross negligence on the part of the defendants was the proximate cause of the child's death.

The Craigs were tried for involuntary manslaughter. Criminal negligence or "conduct intentionally or wantonly disregardful of any interest of others" is a species of involuntary manslaughter. *Perkins on Criminal Law* at 70 (2d ed. 1969). Mrs. Fabritz was tried for child abuse and, as the Court of Appeals pointed out in *Fabritz,* that crime is entirely different. The jury was to determine not whether appellant's conduct was "intentionally or wantonly disregardful of any interest of others," but rather whether

> ". . . Virginia's treatment of Windy was 'cruel or inhumane' within the meaning of the statute and as those terms are commonly understood." 276 Md. at 426.

Although we are troubled by the breadth of that definition of "cruel and inhumane" treatment,[1] we find

[1] As the statute is interpreted by the Court of Appeals and noted by Judge Bowen in his instructions, there is no defined line of demarcation between neglect and abuse. It is also noted that the Craig Court pointed out that "parents are vested with a reasonable discretion in regard to when medical attention is needed for their children." We are not told the standards by which a parent will be held accountable for error in the exercise of such discretion. In the absence of criteria delineating that which is parental discretion, that which is neglect, and that which amounts to abuse under the Court of Appeals' interpretation of the statute (common understanding of "cruel and inhumane"), failure to seek medical aid for one's child propitiously, may be proper parental discretion, simple neglect or culpable criminal

that Judge Bowen's instruction did not violate the standard so prescribed.[2]

Cross-Examination

The determination of criminal culpability by the jury thus rested upon whether they found Mrs. Fabritz's delay in seeking medical attention for Windy was poor judgment, though excusable as parental discretion, *cf. Craig v. State,* 220 Md. at 597; neglect (which was not charged), or inaction amounting to what the jurors "commonly understood" to be cruel or inhumane treatment. The judge described the question in somewhat more narrow terms:

> "Somewhere and the Court is not prepared to say to you where that line is to be drawn, somewhere in the relative descending scale actions become abuse as opposed to neglect.
>
> * * * * * *
>
> Whether the Defendant's conduct was actuated by malice or evil intent and whether you find it was . . . within the framework of this case, either neglect or abuse, is the question you ladies and gentlemen have to resolve."

conduct d pending only upon what the jury decides. The Court of ppeals noted that Virginia knew, or should have known, of Windy's condition for a period of eight hours. We are unable to say at what point during that eight hour period Virginia was 1) exercising discretion in not seeking medical attention sooner; 2) neglectful for not having sought it sooner; and 3) guilty of "cruel and inhumane treatment" for not having sought it sooner than she did. Nor are we able to advise a trial judge what test may be recommended to a jury in their deliberation.

In pointing this out, we hasten to note that the statute was not questioned on constitutional grounds and we are precluded from deciding that issue here on remand. Vuitch v. State, 10 Md. App. 389, 398.

[2] We have appended relevant excerpts of Judge Bowen's instructions clearly illustrating their compliance with the opinion of the Court of Appeals.

Therefore, the most crucial testimony in the case that of the expert medical witnesses produced by the State, one of whom was Dr. Delroy Hire, a pathologist with the State Medical Examiner's office. For reasons undisclosed, appellant submitted as to Dr. Hire's qualifications to testify as an expert pathologist.

> "Mr. Dorsey: Your Honor, I am sure the State's Attorney wants the jury to have the benefit of the background of the doctor. We do submit to his qualifications."

Sometime later, the question concerning Dr. Hire's qualifications was again raised and the stipulation more clearly defined.

> "Mr. Sengstack: For the record Your Honor, it is my understanding that the defense counsel did stipulate that the doctor was an expert.
>
> Mr. Dorsey: Expert as to pathology, Your Honor, not to surgery."

The testimony disclosed that Dr. Hire had performed an autopsy on Windy which indicated her death had come from generalized peritonitis brought about by "blunt trauma," that is, multiple bruises about her entire body. More damaging to Mrs. Fabritz was his testimony that symptoms of distress or serious illness should have been apparent from time to time during the elapsed period between trauma and death. This testimony was designed to show that during the eight hour period that she delayed seeking medical attention, Mrs. Fabritz must have been aware of the seriousness of Windy's condition. Equally critical was the doctor's testimony that, during at least part of this eight hour period, medical attention might have saved Windy's life. Obviously, the weight given by the jury to this expert's opinion that the seriousness of Windy's physical condition would have been apparent to her mother was determinative of the result the jury reached.[3] The very isue before the jury was whether

[3] Dr. Baban, a general practitioner, also testified for the State concerning the physical manifestations of Windy's condition.

Mrs. Fabritz should have known from simple observation that her daughter was in critical and immediate need of medical aid. This was pointed out to the jury when the judge instructed:

> "Now the question of whether or not such action is called for is one of fact and that must be resolved by you ladies and gentlemen. *Critical to the resolution to that question we think and so advise you, is the extent of information or notice that the person having custody of the child had of the necessity for such action.*" (Emphasis added).

On cross-examination appellant therefore sought to discredit the doctor in the eyes of the jury. One attack was based upon his lack of experience as a practitioner of medicine and in treating children of Windy's age for peritonitis. The court precluded that inquiry giving three reasons for foreclosing that line of examination.

> "Q. *How many three year old children have you treated for peritonitis?*
>
> Mr. Sengstack: *Objection.*
>
> Judge Bowen: *Sustained.*
>
> Mr. Dorsey: Well Your Honor this certainly goes into — he has made certain—
>
> Judge Bowen: Objection sustained.
>
> Q. *Well doctor, have you ever actively engaged in the private practice of medicine?*
>
> Mr. Sengstack: *Objection.*
>
> Judge Bowen: *Sustain the objection.* You admitted he was qualified.
>
> Mr. Dorsey: Your Honor I would like to approach the bench please. I do not like to argue in front of the jury.
>
> Judge Bowen: You may do so.
>
> (counsel to bench)
>
> Mr. Dorsey: Your Honor, I objected at the time it was part of his testimony and it was overruled. However, the State's Attorney has had the pathologist testify to certain objective symptoms that this child would have exhibited so many hours prior to death. I certainly think that *I have the right to* cross examine him to, at least, *attempt to refute his testimony to show he is not qualified, he has had no experience on which to base his opinion* as to certain complaints which would be exhibited by this child so many hours prior to her death. He made an unequivocal statement to that effect.

> Judge Bowen: You may cross examine him on that, but what does the variety of practice or anything, or any other type of practice have to do with that. *He obviously doesn't practice clinical medicine.*
>
> Mr. Dorsey: *That is the point I want to bring out to the jury Your Honor. You see, not to attack his report, but to attack his opinions as to—*
>
> Judge Bowen: You may cross examine about his opinions, but I am not going to let you embarrass him by asking about his private practices.
>
> * * * * * *
>
> Q. Now doctor you have really concerned yourself in your medical career with the pathology of medicine and I guess in later years you have concentrated on it. A. That is partially true. We are all doctors first and then we specialize.
>
> Q. And you specialized in pathology. A. Right.
>
> Q. And in the course of — you have actually never treated patients or—
>
> Mr. Sengstack: Your Honor, Mr. Dorsey has been warned about this once already and the State would object. There is a proper way to ask it and an improper way. Mr. Dorsey insists on asking it the improper way.
>
> Judge Bowen: Finish your question.
>
> Q. So doctor in the period of time that you have been engaged or graduated from law school— A. Law school?
>
> Q. I mean medical school, *in the period of time you graduated from medical school, you really*

have not been familiar with complaints exhibited by patients in the course of treatment.

Mr. Sengstack: *Objection.*

Judge Bowen: *Objection sustained. He doesn't tend patients.*

Q. *Doctor then you have not been engaged in the practice of medicine in which you would diagnose and treat patients?*

Mr. Sengstack: *Objection.*

Q. *Or have you ever been so engaged.*

Judge Bowen: *Objection sustained."* (Emphasis added).

The judge pointed out that appellant had admitted that the doctor was qualified, that it was obvious that the doctor didn't practice "clinical medicine," and he should not be "embarrassed" by asking him about his private practice.

We do not find the judge's reasons for denying that line of cross-examination persuasive. The stipulation by appellant as to the doctor's qualifications was an admission that he was qualified to express an expert opinion, not that his qualifications were inpeccable and unimpeachable. Furthermore, appellant explained that this stipulation that the doctor was qualified was limited to the speciality of pathology. Secondly, although it was "obvious" to the judge that a pathologist is not a treating physician, this fact had not been imparted to the jury and thus the appellant should not have been precluded from further examination. Finally, the judge's desire to protect the doctor from embarrassment would have been commendable had it not interfered with the rights of appellant. Citing *Alford v. United States,* 282 U.S. 687, 694, the Supreme Court in *Davis v. Alaska,* 415 U.S. 308, 320 held that the court is under no obligation "to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked."

The answers appellant sought to elicit bore directly on the weight the jury should give to Dr. Hire's testimony, upon which much of the case against Mrs. Fabritz was based. The subject matter was clearly relevant. See C. McCormick, *Evidence,* § 185 at 435 (2d ed. 1972). Dr. Hire's opinion that the outward symptoms of illness, malaise and pain must have been manifested by Windy as a result of her condition was the evidence before the jury of "the extent of information or notice" given to Mrs. Fabritz which the judge instructed was critical to the resolution of the case. Thus, the doctor's believability was crucial to the defense and

> "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Davis v. Alaska,* 415 U.S. 308, 316.

In *Wimpling v. State,* 171 Md. 362, 376, the Court of Appeals held that opinions of experts should not be allowed on subject within the range of common knowledge of the average man. In so ruling, the Court emphatically held that expert opinion testimony should only be resorted to when "it clearly appears that it is essential to a full and fair presentation of the case and will aid the trier of fact in dealing with it," because such testimony is of the "very lowest order and the most unsatisfactory character." Impliedly then, it should be scrutinized carefully and subjected to rigid cross-examination to test the foundation upon which the opinion was formed. The Court quoted *Jones on Evidence,* saying:

> " 'It has been said of expert testimony: 'It is not desirable in any case where the jury can get along without it, and is only admitted from necessity, and then only when it is likely to be of some value.' 'The evidence of experts is of the very lowest order

> and the most unsatisfactory character.' All testimony founded upon opinion merely is weak and uncertain, and should in every case be weighed with great caution. 'The unsatisfactory nature of such evidence is well known. . . .'" *Wimpling v. State,* 171 Md. at 376.

One way of attacking an expert opinion is to show the expert's lack of experience, thus discrediting the source of knowledge upon which he bases his opinion. By doing so, the cross-examiner affords the jury an opportunity to decide that the "expert" has feet of clay and his opinion is not to be valued.

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' Douglas v. Alabama, 380 U.S., at 419, 13 L. Ed. 2d 934." *Davis v. Alaska,* 415 U.S. at 317.

Davis v. Alaska, supra, dealt with the denial of cross-examination of a witness concerning his juvenile record, but again underscored the Supreme Court's prior rulings that a denial of the right of effective cross-examination is "constitutional error of the first magnitude [which] no amount of showing of want of prejudice [can] cure. . . ." *Davis v. Alaska,* 415 U.S. at 318; *Brookhart v. Janis,* 384 U.S. 1, 3; *Smith v. Illinois,* 390 U.S. 129, 131.

Harmless Error

The denial here was error; but, the State argues that, assuming the court improperly restricted the scope of cross-examination, "such action by the trial court was harmless error, for it is well settled that the reception or rejection of improper evidence is not reversible error unless there is demonstrable prejudice. *Barger v. State,*

2 Md. App. 565 (1967); *Duncan v. State,* 5 Md. App. 440 (1968); *Williams v. State,* [15 Md. App. 320 (1972)]." The State points to related testimony permitted by the court arguing that it sufficed to put the doctor's experience into evidence.

We can find no basic difference between the questions permitted and the questions denied. As indicated in context above, the judge denied answers to three questions, two of which were:

> 1. "How many three year old children have you treated for peritonitis?"
>
> 2. ". . . [I]n the period of time you graduated from medical school, you really have not been familiar with complaints exhibited by patients in the course of treatment."

While the objections to these questions were sustained, the witness, over objection, was permitted to answer a later question asked by appellant:

> "Well, in the period of time since you graduated from medical school and been a doctor, have you ever observed any living person suffering from peritonitis?"

Following an affirmative answer, appellant then pursued by asking:

> "And on how many different occasions have you — and what were their ages?"

Again an answer was permitted and further follow-up questions were asked without objection.

Appellant had expressly stated what he sought to elicit by this line of questioning in his colloquy at the bench with Judge Bowen:

> ". . . I have the right to . . . attempt to refute his testimony to show he is not qualified, he has had no experience on which to base his opinion. . . .
>
> Judge Bowen: You may cross examine him on that, but what does the variety of practice or anything, or any other type of practice have to do

with that. He obviously doesn't practice clinical medicine.

Mr. Dorsey: That is the point I want to bring out to the jury Your Honor. You see, not to attack his report, but to attack his opinions. . . ."

Appellant's purpose was also reflected in the third question to which an objection was sustained:

3. "Doctor then you have not engaged in the practice of medicine in which you would diagnose and treat patients?"

Once again we find that the appellant provided an opportunity for the judge to correct his former error and once again, intentionally or not, he did so, this time by permitting the question and answer, uninterrupted by an objection.

"Q. What practical experience do you have doctor from subjective complaints made from living persons that you have observed? What practical experience do you have to state your opinion as to the objective and subjective complaints a three year old child would have from suffering from peritonitis some five hours prior to her death? A. In medical school, before you become a doctor you are engaged in diagnosing and treatment of all kinds of diseases, either medical, physical, pediatrics, whatever. I have already stated I am not a pediatrician, I am a pathologist, but as far as the medical diagnosis of patients, I have been engaged in that ever since the days of medical school. As far as treatment of patients, the same.

Q. You are then engaged in the practice of medicine? A. Pathology is a practice of medicine, it is a speciality of medicine.

Q. You could conduct a test. A. Yes."

Each question to which an objection was originally sustained was later permitted — practically in *totidem verbis*. The purpose for which the examination was sought, as expressed by appellant, was fulfilled to

appellant's seeming satisfaction since he voluntarily abandoned that line of questions after successfully covering the issue on his second attempt.

As pointed out in *Chapman v. California*, 386 U.S. 18, 23, not all "trial errors which violate the Constitution automatically call for reversal." The error here was rendered harmless because subsequently corrected. Although the trial judge did not expressly reverse his prior rulings, he did so in fact, by a contrary ruling when the question concerning Dr. Hire's experience was raised a second time. The follow-up questions were asked and answered without objection.

We cannot find that there is a reasonable possibility that the initial erroneous rulings of the trial judge contributed to the conviction. See *Chapman, supra* at 23. Recognizing that opinion evidence is of the "very lowest order and the most unsatisfactory character," *Wimpling v. State*, 171 Md. 362, 376, and thus implicitly should be subject to rigid cross-examination, we find no question asked,or proffered, which was not subsequently permitted even though initially denied. We conclude that the "minds of an average jury" would not have found that State's case significantly less persuasive had the questions been permitted when first asked rather than when ultimately allowed. *Schneble v. Florida*, 405 U.S. 427, 432. The jurors had the benefit of the defense theory before them, *cf. Davis v. Alaska*, 415 U.S. at 317.

Judgment affirmed.

"Now the actions which the Statute prescribes are abuse which results from cruel or inhumane treatment. I don't think that those words need any special definition to you ladies and gentlemen. You know what is cruel and I am sure you know what the word 'inhumane' means. If the treatment is cruel or inhumane and it results in physical injury, it is absue within the definition of this Statute. If physical injury results as a result of a malicious act, it is also abuse within the meaning of this Statute. Perhaps the word malicious does need some further explanation for you. An act is done with malice or it is malicious if it is an act that is done with an evil or wicked intent or motive. The term malice implies an evil or imports, I should say, the term 'malice' imports an evil wicked purpose in the doing of an act.

* * * * * *

In addition to the duty to refrain from doing that sort of thing, a parent or custodian of a child, has by virtue of the position by which they stand and the dependency of the child, a duty to take positive action and affirmative action to see that physical injury does not occur to that child if they are put on notice that the need for such action exists. You may be entitled to do what the Pharisee and the Levite did, that is cross the road and go down the other side if the person who is in danger of expiring is not your child, but when you have a child who is in your care and custody, you have an affirmative duty, not only to provide it with shelter and sustenance, but also those reasonable medical necessities which may mean the difference between its chance to life and death.

Now the question of whether or not such action is called for is one of fact and that must be resolved by you ladies and gentlemen. Critical to the resolution to that question we think and so advise you, is the extent of information or notice that the person having custody of the child had of the necessity for such action.

Now, there are some actions which may be termed under the heading of neglect of children which contravene the criminal law. Neglect generally encompasses the failure to provide the basic necessities for life; that is, minimum shelter, minimum degree of sustenance and minimum degree of supervision and protection. There comes a time in this country when if the treatment of your children falls below what the community expects in these areas and the matter is brought to the attention of the authorities, you will be charged with neglect and the State will step in to provide what the parent or the custodian is deficient in providing.

Some where and the Court is not prepared to say to you where that line is to be drawn, some where in the relative descending scale actions become abuse as opposed to neglect. The Court would suggest that the distinction between abuse and neglect in the failure to do what you ought to do as opposed to doing something you ought not to do in direct relationship to the child, comes when the failure becomes a failure to provide something that is in the absence of its provision life threatening or apt to produce death or serious bodily harm; thus five meals in a row missed, may produce a very hungry and a very distressed child, but alone not necessarily life threatening. There comes a time when medical attention is called for and obviously necessary, if it is not provided, it is life threatening and it is on that position as I understand it that the State is proceeding in this case.

Whether the Defendant's conduct was actuated by malice or evil intent and whether you find it was of that, as a fact within the framework of this case, either neglect or abuse, is the question you ladies and gentlemen have to resolve.

* * * * * *

The State must show that her conduct amounted to cruel and inhumane treatment of this child or that it was a malicious act and that as a result of the cruel and

inhumane treatment or the malicious act, physical damage occurred to the child and that combination meets the definition of abuse in the Statute. Anything short of that, the Defendant must be acquitted.

This is not a case where we are trying somebody for neglect, this is a separate criminal act of child abuse."

Memorandum & Order

(Filed January 20, 1977)

United States District Court for the District of Maryland.

Civil A. No. Y-76-967

Virginia Lynnette Fabritz,
Plaintiff,

v.

Harry J. Traurig,
Superintendent, Maryland Correctional Institution for Women,
Defendant.

MEMORANDUM AND ORDER

Petitioner is in this Court on petition for a writ of habeas corpus having been convicted in the Circuit Court for Calvert County of child abuse in violation of Maryland Article 27, § 35A. She appealed her conviction to the Maryland Court of Special Appeals where it was reversed on the ground that the statute did not reach the conduct charged. *Fabritz v. State,* 24 Md. App. 708 (1975). The Maryland Court of Appeals reversed the Court of Special Appeals, construing the statute to include petitioner's conduct, and remanded the case for further consideration. *State v. Fabritz,* 276 Md. 416 (1975). After more proceedings in the state appellate

courts, petitioner sought writ of certiorari to the United States Supreme Court which was denied. 425 U.S. 942 (1976).

The facts of the case are taken from the opinion of the Maryland Court of Appeals in *State v. Fabritz, supra.*

> Virginia Lynnette Fabritz (Virginia) was charged with violating this statute by abusing her three-and-one-half year old daughter Windy. Evidence adduced at the trial before a jury in the Circuit Court for Calvert County showed that Windy was brought to the Calvert County Hospital at 10:35 p.m. on October 3, 1973 in a badly beaten condition with approximately seventy bruises or contusions covering her body, ranging in size from one inch to five inches. She was pronounced dead on arrival at the hospital, her death being attributed to peritonitis resulting from a perforated or ruptured duodenum. The evidence showed that Windy's injuries were the result of "blunt trauma" caused by an instrument or a first, or some kind of blow inflicted within eighteen to twenty-four hours prior to her death.
>
> Virginia had left Windy in the custody of Thomas Crockett and his wife Ann, with whom she resided, on October 1. Virginia did not see Windy again until 1 p.m. on October 3, at which time she noticed that Windy was very listless. Crockett told her that Windy had driven with him on his motorcycle and had gotten sick as a result of a bumpy ride. At 2:30 p.m. Windy complained of cramps and was running a slight fever; Virginia attributed this to the flu. She then bathed Windy and, after observing her badly beaten body, put her to bed and spent the remainder of the afternoon watching Crockett work on his motorcycle. At 5 p.m. Virginia observed that Windy appeared to be in a semiconscious state, but she did not take her to the hospital because she "was too ashamed of the bruises on her daughter's body." There was evidence that Windy thereafter sat up and appeared normal for a brief period, but at 6 p.m. she vomited and again complained that she did not feel

well. At 7 p.m. Virginia put Windy back to bed and called a friend, Connie Schaeffer, and asked that she look at Windy. Miss Schaeffer arrived at 9 p.m. Windy was lying on the floor of the den, covered by a wet diaper. She was limp, and appeared unconscious. When Miss Schaeffer questioned Virginia about the bruises on Windy's body, Virginia responded, "Tommy (Crockett) hits hard." Windy's condition worsened and at 9:45 p.m. Ann Crockett contacted the hospital. She was advised to bring Windy to the hospital immediately. After Mrs. Crockett left for the hospital with Windy, Virginia told Miss Schaeffer, "It is my fault. I killed her." Shortly thereafter, Virginia went to the hospital and learned that Windy was dead.

Expert medical evidence was adduced to show that a child with peritonitis would vigorously complain once she sustained the injury and would continue to complain until the onset of a coma; that at the time the injuries were sustained, there would have been immediate pain and the child would have begun to feel poorly; that the pain would have gradually increased, followed by fever, vomiting, and lack of appetite; that within six hours prior to death, the child would have become stuporous and comatose; that Windy would have lived had an operation been performed within at least twelve hours prior to death; and that she would have had a chance to survive if surgery had been performed up to an hour before death. A pathologist testified that it was his medical opinion, based upon the degree of injury, the multiplicity of wounds and his examination of Windy's body, that the injuries did not happen accidentally. There was no evidence indicating that Virginia struck the blows which caused the initial injuries to her child, nor was there any evidence to show that Virginia had knowledge that the person in whose custody she left Windy would abuse her.

276 Md. at 418-19.

Based on these facts, petitioner was found guilty of violating Maryland Article 27, § 35A, "Causing abuse to a child under eighteen," and sentenced to five years imprisonment. The statute provides as follows:

> Any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision of a minor child under the age of eighteen years who causes abuse to such minor child shall be guilty of a felony and upon conviction shall be sentenced to not more than fifteen years in the penitentiary.

Insofar as it is relevant to this case, the statute defines "abuse" as:

> (A)ny: (A) physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child . . .

Failure to Exhaust Available State Remedies

The issues raised in this Court center around a challenge to the constitutionality of applying § 35A to petitioner's conduct. They apparently have not been raised in any state court proceedings. However, because they derive from a construction given to a criminal statute by Maryland's highest court in this very case, it seems that any attempt to exhaust remedies would be futile, and this Court will not require petitioner to return to the state courts. *Mohr v. Jordan,* 370 F. Supp. 1149 (D. Md. 1974) (Harvey, J.).

Petitioner's Constitutional Claims

Petitioner presents a number of arguments on her behalf. She alleges that the statute as written is unconstitutionally vague as applied to the facts of her case insofar as the construction given it by the Maryland Court of Appeals was not to be anticipated; that the standard "cruel or inhumane" is too indefinite to give guidance to a trier of fact; that this construction failed to adhere to a principle of strict construction of criminal laws; and that what the Maryland Court of

Appeals did amounted to the equivalent of ex post facto law making. While these arguments are presented separately in petitioner's memorandum, their thrust is the same.* The Court will treat the issue raised as whether § 35A is unconstitutionally vague as applied to petitioner's conduct for failure to give adequate guidance to a trier of fact and adequate notice that neglect in seeking necessary medical attention for her child could be covered by the statute.

Vagueness

In support of her claim of unconstitutional vagueness, petitioner points to an absence of clear legislative intent or prior judicial construction indicating her conduct fell within the statute. Section 35A was amended in 1973 to include the phrase "cruel or inhumane treatment" within the definition of abuse. Prior to the 1973 amendments, the statute only reached affirmative kinds of abuse. *State v. Fabritz,* 276 Md. at 423. The record of the legislature's intent in enacting the amendments sheds little light on whether after their passage, a failure to act by neglecting to seek medical attention could also amount to abuse. At the time petitioner's child died, there was no judicial construc-

* Petitioner cites a number of cases in support of her argument that the Maryland Court of Appeals failed to meet a due process requirement that criminal statutes be strictly construed. United States v. Bass, 404 U.S. 336 (1971); United States v. Enmons, 410 U.S. 396 (1973); Rewis v. United States, 401 U.S. 808 (1971); Bell v. United States, 349 U.S. 81 (1955); McBoyle v. United States, 283 U.S. 25 (1931). These cases recognize a rule of construction that binds federal courts in construing Congressional criminal enactments. One concern expressed in the cases supporting such a rule was the requirement of fair notice. But the Court did not purport to impose it as a limitation on state power independent of the vagueness doctrine.

Similarly, petitioner's "ex post facto law making" argument has no merit. The assumption on which the argument is premised is that she did not have fair notice that her conduct could be covered by the statute. If this is the case, the vagueness doctrine will bar the prosecution and there is no need to resort to the ex post facto provision.

tion of the amendments clarifying this uncertainty in their scope. The Court therefore is left to view the statutory provision without the "gloss" of legislative history or judicial construction to see if it can constitutionally be applied to defendant's conduct.

The due process standard for challenging a criminal statute on vagueness grounds is whether "men of common intelligence must necessarily guess at its meaning and differ as to its applications . . ." *Connally v. General Construction Co.,* 269 U.S. 385 (1926). The Supreme Court has said that the "essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct . . ." *Jordan v. DeGeorge,* 341 U.S. 223 (1951). The statute must give fair notice of the offending conduct. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972). The due process clause does not permit a legislature to require persons to speculate as to the meaning of penal statutes. *Lanzetta v. New Jersey,* 306 U.S. 451 (1939).

Vagueness as a constitutional problem usually arises because the legislature is unable to write statutes with the precision that would be desirable. Too often the types of conduct it seeks to reach cannot be clearly foreseen. The Supreme Court has said that it goes "far to uphold state statutes that deal with offenses, difficult, define, when they are not entwined with limitations on *free expression.*" (emphasis added). *Winters v. New York,* 333 U.S. 507 (1948). In fact, in recent years, the Court has candidly admitted that:

> (I)n a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.

Smith v. Goguen, 415 U.S. 566 (1974). The due process clause does not allow statutory language of such standardless sweep as to allow policemen, prosecutors and juries to pursue their "personal predilections." The problem in Smith was said to be "selective law enforcement." In this case, petitioner does not allege she is being isolated for prosecution under the statute.

In contrast to *Smith v. Goguen, supra,* where behavior, arguably within the scope of the statute might have been protected by the first amendment, petitioner's conduct here is unprotected and in the Court's view, outrageous. Maryland law imposes a duty on a parent to provide for the medical needs of his or her child. Article 72A, § 1. Failure to do so may amount to a criminal homicide. *Palmer v. State,* 223 Md. 341 (1960). Federal courts should hesitate before pointing to some uncertainty in the scope of a state criminal statute as a ground for finding a violation of due process when the conduct alleged is in every respect inexcusable.

This Court is convinced that petitioner was provided with fair notice that the Maryland Court of Appeals would construe section 35A to include her conduct within the scope of the statute. The Court agrees the phrase "cruel or inhumane treatment" is not a model of statutory precision, but holds that the failure to act proves in petitioner's case could reasonably have been foreseen to fall within the meaning of that phrase even by one unfamiliar with the peculiar legal usages of the English language. According to Webster's Third New International Dictionary, "treatment" is defined in a way which includes "conduct or behavior towards another party" within its meanings. "Cruel" includes "devoid of kindness," "arising from or indicative of an inclination to enjoy another's pain or misfortune," and "stern, rigorous, and grim: unrelieved by leniency or softness." "Inhumane" is defined as not "marked by compassion, sympathy, or consideration for other human beings." The definitions quoted here indicate that failing to act can be a form of "treatment" because it is a manifestation, albeit a negative manifestation, of

conduct or behavior towards another. Failure to seek attention for the critical medical needs of one's child could be "cruel" because it is "devoid of kindness," or "inhumane" because it lacks "compassion, sympathy, or consideration."

Petitioner cites *Furman v. Georgia,* 403 U.S. 238 (1972) and *Gregg v. Georgia,* — U.S. — (1976) to illustrate the uncertainty surrounding the meaning of the phrase "cruel and unusual" in the eighth amendment. She suggests the Maryland standard is no less uncertain. Without intending to suggest that the eighth amendment's limitation on governmental action in anyway controls the reasonable meaning of the Maryland definition of child abuse, the Court calls petitioner's attention to *Estelle v. Gamble,* 45 U.S.L.W. 4023 (November 30, 1976). There it is noted that deliberate indifference of prison officials or personnel to serious medical needs of prisoners constitutes cruel and unusual punishment proscribed by the eighth amendment.

The Court in reaching the conclusion here expresses no opinion on the construction given to § 35A by the Maryland Court of Appeals. Obviously, it is a question as to which reasonable judicial minds have differed. Petitioner points to this disagreement among the Maryland appellate judges to support her argument that the statute does not provide fair notice. But the fact that four out of ten appellate judges disagreed with the highest Maryland Court's majority opinion as to a proper *construction* of the statute does not close the issue whether fair notice was given that it might be construed in the way it has been.

Petitioner questions the propriety of the trial judge's charge to the jury which left the jurors free in their deliberations to apply their own understanding of the standard "cruel or inhumane treatment." The trial judge suggested but not instruct that the dividing line between statutory abuse and simply noncriminal neglect might be where the failure to act endangered

life. In the absence of a more precise instruction, this Court must assume the jury interpreted the phrase "cruel or inhumane treatment" in a way consistent with its general meaning discussed above. Just as that meaning gave petitioner fair notice that her conduct might violate the child abuse statute, it provided adequate guidance for the jury in determining guilt. All that the State attempted to prove was knowing neglect of the serious medical needs of petitioner's child that resulted in her death. This is all upon which the jury could have based its guilty verdict. In its deliberations, the jury could reasonably have found that petitioner's conduct was "cruel" or "inhumane" and therefore violated the statute.

For the foregoing reasons, it is this 20th day of January, 1977 by the United States District Court for the District of Maryland.

ORDERED:

That the petition for Writ of Habeas Corpus be, and the same is, hereby DENIED.

JOSEPH H. YOUNG
United States District Judge.

Opinion
(Filed September 28, 1978)

United States Court of Appeals
for the Fourth Circuit

No. 77-1411

Virginia Lynn Fabritz,
Appellant,
v.
Harry J. Traurig,
Superintendent, Maryland Correctional Institution
for Women,
Appellee.

Appeal from The United States District
Court for The District of Maryland,
at Baltimore, Joseph H. Young,
District Judge.

(Argued October 7, 1977 Decided September 28, 1978)

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge and Russell, Circuit Judge.

Albert V. Bryan, Senior Circuit Judge:

Habeas corpus was refused by the District Court to Virginia Fabritz, a 20-year old mother, who was imprisoned under a conviction and five-year sentence in a Maryland court for abuse — delayed medical attention — touching the death of her daughter, Windy, three years of age. Maryland Code (1971 Repl. Vol.,

1975 Cum. Supp.) Art. 27, § 35A(a).[1] The Court of Special Appeals of Maryland reversed, but the Court of Appeals affirmed.[2]

While fully recognizing the lettered study and explication of both the statute and the evidence by the Maryland Judges as well as by the District Judge, we are forced to the view that the conviction is void for denial of Fourteenth Amendment due process. This is because the "conviction [is] based on a record lacking any relevant evidence as to a crucial element of the offense charged," i.e., that the mother had knowledge of the critical gravity of her daughter's condition when she deferred resort to medical advice for the little girl. Vachon v. New Hampshire, 414 U.S. 478, 480 (1974).

True, she saw the multiple severe bruises (later counted as 70) on the child, apparently caused by body blows, but the testimony indisputably establishes, and the State conceded, that she was totally ignorant of when or how they had been inflicted. Indeed, she had been away from home the two or three days previous.

[1] § 35A. Causing abuse to child under eighteen.

* * * * * *

(a) *Penalty.* — Any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision of a minor child under the age of eighteen years *who causes abuse* to such minor child shall be guilty of a felony and upon conviction shall be sentenced to not more than fifteen years in the penitentiary. (Accent added.)

* * * * * *

(b) 7. "*Abuse*" shall mean any: (A) *physical injury or injuries* sustained by a child as a result of *cruel or inhumane treatment* or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child (B) any sexual abuse of a child, whether physical injuries are sustained or not. (Accent added.)

* * * * * *

[2] 276 Md. 416 (1975); 24 Md. App. 708; certiorari denied 425 U.S. 942 (1976).

Furthermore, mother and daughter loved each other deeply, and the mother set about at once to learn of the child's ailments and to give relief. The narration, in a moment, of the evidence will not reveal a modicum of it as manifesting to the mother the precarious state of Windy's life. Only after watching her for almost eight hours, and then with the assistance of a woman neighbor, did the two of them realize the child's peril. It was then they sought medical advice, but the child died in the ambulance en route to the hospital about one-half hour later.

Appellant, Virginia Fabritz, was indicted in two counts, child abuse and assault and battery. At trial acquittal was ordered on the latter for absence of proof, but the jury found her guilty of child abuse.

The evidence follows. Fabritz resided with her daughter, Windy, in the home of Thomas L. Crockett and his wife, Ann. The child was three years old when, on October 1, 1973, she was left with the Crocketts while her mother went to her grandfather's funeral in another county. She did not again see Windy until her return at 1:00 o'clock on the afternoon of October 3rd. She was met by Crockett with his motorcycle and with Windy riding in the side car. To the mother the child looked unwell. Crockett attributed this appearance to the bumpiness of the motorcycle ride.

On arrival home about 2:30 that afternoon, Windy began to suffer with cramps and to her mother seemed feverish with the flu. At this time she noted the bruises on her body. After bathing her, Fabritz put her to bed or on a couch. Soon afterwards, Windy was seen to have gotten up and curled herself in a blanket on the floor. At 5:00 the child was semi-conscious and improved sitting up for a brief interval after receiving some liquid nourishment. Near 6:00 that afternoon, Windy vomited and showed she was not feeling well. At 7:00 she was put back to bed. Believing the child to have a temperature, her mother sent for a thermometer. The little girl was given soda to settle her stomach, as well

as more liquid nourishment, and placed in bed again around 7:30 or 8:00.

Fabritz twice telephone Connie Schaeffer, a neighbor, for assistance, telling her of the child's flu and of her worsening condition. On arrival Schaeffer, too, saw that Windy had a fever. Asked about the bruises on Windy, the mother replied, "Tommy hits hard". They bathed her in alcohol and put her to bed. At this point the child appeared to Schaeffer to be half asleep, neither moaning nor crying.

Schaeffer testified at trial that she did not know what was the matter with Windy, and had left the Crockett house without suggesting medical assistance. Further testimony related that at this moment Ann Crockett arrived home and discussed with Fabritz the procurement of medical attention and Fabritz asked Ann to keep an eye on Windy. The two concluded it was necessary to seek help. Ann called the County Hospital, and was advised by the doctor that the women should bring the child to the hospital.

It was then that Ann, on entering the child's bedroom, perceived she was not breathing. Thereupon she sought an ambulance while Fabritz applied mouth-to-mouth resuscitation. The rescue ambulance took Windy, accompanied by Ann, to the hospital. Meanwhile, Schaeffer saw Fabritz in a hysterical condition, endeavored to calm her and drove her to the hospital, where they were informed the child had been declared dead on arrival at 10:35. In this state she told Schaeffer, "It is my fault, I killed her".

The medical opinion was that 18 to 24 hours before death — during Fabritz' absence from home — the child had been struck in the abdomen by a blunt instrument, possibly a fist, rupturing the duodenum and leading to death from peritonitis. No evidence intimated that Fabritz had knowledge that the person in whose custody Windy was left would abuse her.

At one juncture Fabritz remarked that she had not taken Windy to the hospital because Fabritz "was too ashamed of the bruises" on her body. On his trial Crockett was acquitted of any connection with the death. At her trial the prosecution conceded that Fabritz had not struck the child.

The Maryland Court of Appeals' conclusion was that Fabritz' "inaction amounted to child abuse"; that her "failure to obtain medical attention" constituted "cruel or inhumane treatment"; and that this treatment was a cause of the child's "physical injury". In determining to grant Fabritz habeas corpus, we accept the statute as valid, as did the Court of Appeals of Maryland and the District Court, and accept, too, their clear exposition of the critical words of the law. The statute simply was unconstitutionally applied.

Our conclusion does not affront the conclusion of the Maryland Court, nor that of the District Court. The three steps of the State Court's reasoning do not preclude a finding that the evidence is wholly wanting in proof of an indispensable factor: that during the three stages of the syllogism "Fabritz had knowledge that she was risking the life of her child." That is the decisive issue here.

The evidence is utterly bare of proof of a consciousness of criminality during her bedside vigil. *Cf.* Morissette v. United States, 342 U.S. 246, 270-271 (1952). This may have been an error of judgment, however dreadfully dear, but there was no awareness of wrongdoing on her part. The jury's contrary verdict on that question finds no warrant in the testimony. Fabritz' error amounted to a failure to procure medical attention in less than eight hours after her arrival at home. Without expert medical knowledge to place her on notice of the fatal nature of the child's illness, she treated her as best she knew. The misjudgment was only to the significance of the symptoms and of the immediacy of demand for professional care. In these circumstances the conviction cannot stand — without even so much as a murmur of evidential justification.

As the Court said in Thompson v. Louisville, 362 U.S. 199 (1960):

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." At 199.
>
> * * * * * *
>
> "[S]o is it a violation of due process to convict and punish a man without evidence of his guilt." (footnote omitted) At 206.

It would be a radical overthrow of the universal understanding of motherly devotion, as well as the confidence gained by experience to be accorded the judgment of two women having the responsibility of a sick 3-year old, to hold the conduct of the mother or of her friend suspect. Especially is this true when it is remembered that although the child would have survived "had an operation been performed within at least twelve hours prior to death," Fabritz had not even then returned from her grandfather's funeral. The callings of nursing and baby-sitting ought not impose so frightening a trusteeship.

The judgment on appeal will be vacated and the case remanded to the District Court to grant the writ.

Vacated with Directions.

HAYNSWORTH, Chief Judge, dissenting:

I have a great deal of sympathy for this young woman who has spent a time in prison on a conviction of child abuse arising out of the death of her three-year old daughter, though generally the mother had been a loving and considerate one. My sympathy for the mother is enhanced by the fact that the person who inflicted the fatal injury upon the child has remained

unpunished. I think, however, that the proof at trial did not permit a conclusion on our part that there was no evidence to support a finding of a violation of the statute by the mother.

Of course, a parent should not go prison for an erroneous diagnosis of a child's illness, but the Court of Appeals of Maryland has clearly held that the statute is violated if a custodian of a child knowingly withholds medical assistance and if the child's condition is aggravated or if death ensues as a result of want of medical attention.[1]

Indeed, Maryland has long embraced the common law doctrine that one who, through gross negligence, fails to perform a legal duty owing to another as a result of which the other dies is guilty of involuntary manslaughter. *See Palmer v. State,* 223 Md. 341, 164 A.2d 467 (1960); *Craig v. State,* 220 Md. 591,155 A.2d 684 (1954).

There can be no doubt here that the multiple bruises were not symptomatic of influenza. When the neighbor saw the child, she was moaning in pain. That and her comatose condition should have signalled a more serious condition than the flu. That the mother recognized that there may have been internal injuries is supported by the testimony that she explained the child's bruised condition to the neighbor by saying, "Tommy hits hard."

One may suppose that this three-year old child had told her mother who had beaten her, and the record clearly indicates that Tommy Crockett was the lover of both of the women who shared the house with him. Thus, she explained to the neighbor that she had not sought a physician's help because she was ashamed of the bruised condition of the child's body and that if the

[1] We are not met with the special problem which might be presented if the parent were a Christian Scientist or if the decision was one of a kind that ought to be left to parental discretion.

child were seen by a physician she would have to explain the origin of the bruises.

I put no great weight on her exclamation after being informed that the child was dead, "I killed her," but her statements to the neighbor before the child was dead of her reasons for not having sooner sought medical help furnished support for a finding that for some hours the mother consciously refrained from seeking medical help to protect Crockett from possible criminal charges and support her own ego. Though the mother was generally loving and protective of her daughter, a conscious indulgence of such a preference is in violation of Maryland's Child Abuse Law when earlier medical attention might have saved the child's life.

I cannot agree that this conviction was devoid of evidentiary support.